Petition

Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1981

GORDON L. WALGREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does juror misconduct require reversal unless the court can declare that the misconduct was harmless beyond a reasonable doubt? If so, is reversal required where a juror's independent research led the juror to an erroneous conclusion which weakened the defendant's testimony that he believed he was dealing honestly with a legitimate business?

2. In reviewing the sufficiency of evidence to support a federal conviction, must the appellate court apply the standard of review imposed on state convictions in Jackson v. Virginia, 443 U.S. 307 (1979)? If so, could any rational trier of fact find beyond a reasonable doubt that the petitioner caused an interstate telephone call, where the call was placed by a government agent who tes-

tified that he did not know from where he made the call, and the government failed to comply with a defense request to produce the telephone toll records which should have established whether the call was interstate?

3. Do rough notes and draft reports made by an undercover government agent constitute statements of the agent which the government must retain and produce under the Jencks Act?

4. Must a criminal prosecution be dismissed for outrageous government conduct where the defendant declined to enter into an illegal scheme repeatedly proposed by government agents during a twenty-two month investigation?

If the Court allows the writ, petitioner asks the Court to consider an additional issue.

5. Has the defendant caused a mailing in furtherance of a scheme to defraud where the treasurer of a political committee supporting the defendant mailed an accurate public disclosure statement as required by state law?

PARTIES TO PROCEEDING IN COURT BELOW

Petitioner Gordon Walgren, John Bagnariol and Patrick Gallagher were charged and tried under a multiple-count indictment. All three parties have been represented separately throughout these proceedings. Petitioner Walgren, Mr. Bagnariol, and Mr. Gallagher separately petition for this Court for a writ of certiorari. The parties have prepared a joint appendix which is separately bound.

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NO.

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October Term, 1981

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Gordon Walgren respectfully prays that a writ of certiorari issue to review the per curiam opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 21, 1981.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 665 F.2d 877 and is reproduced in Appendix A. The decision was rendered per curiam by Chief Judge Browning, Circuit Judge Wright, and District Judge Bruce R. Thompson, sitting by designation.

JURISDICTION

The opinion below was filed on December 21, 1981. A timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied on February 2, 1982. (Appendix G) This petition for certiorari is filed within sixty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are Amendments V and VI to the United States Constitution. The United

States statutes involved, all in United States Code Title 18, are: Section 1341, mail fraud; Section 1951, interference with commerce by threats or violence (Hobbs Act); Section 1952, interstate and foreign travel or transportation in aid of racketeering enterprises (travel act); Sections 1961 and 1962, racketeer influenced and corrupt organizations (RICO); Section 3500, demands for production of statements and reports of witnesses (Jencks Act). The following statutes of the State of Washington are involved: Wash.Rev.Code § 9A.68.010, bribery; Wash. Rev.Code § 42.17.020 and .080, Public Disclosure Act. The provisions involved are lengthy and their pertinent text is set forth in Appendix H.

STATEMENT OF THE CASE

A. Proceedings Below.

Petitioner Gordon L. Walgren, John Bagnariol and Patrick Gallagher were

charged under a multiple-count indictment with violating RICO, the Hobbs Act, the travel act, and the mail fraud act. Petitioner Walgren was at the time majority leader of the Washington State Senate. Mr. Bagnariol was co-speaker of the Washington State House of Representatives and an unannounced candidate for governor. Mr. Gallagher was a lobbyist. The government accused Mr. Walgren and Mr. Bagnariol with agreeing to use their influence to legalize gambling in the state of Washington in return for a share of the profits realized through gambling by So-Cal Company or So-Cal Enterprises, a fictitious creation of the FBI.

Trial lasted thirty-five days from July through September, 1980 before Judge Walter T. McGovern of the United States District Court for the Western District of Washington at Seattle. Thirteen counts against Mr. Walgren were submitted

to the jury. The jury deliberated for nine and one-half days, found Mr. Walgren not guilty of five counts, guilty of three counts, and was unable to reach a verdict on the remaining five counts. All three defendants were sentenced to five years imprisonment on each count, with the sentences to run concurrently.

The Court of Appeals affirmed the defendants' convictions on all counts.

B. The Evidence Against Petitioner Walgren Must Be Considered Separately.

Count I of the indictment charged each of the defendants with conspiracy to violate RICO. The jury was unable to reach a verdict as to petitioner Walgren. Mr. Bagnariol and Mr. Gallagher were convicted of conspiracy.

Bagnariol's and Gallagher's statements and actions cannot be imputed to petitioner Walgren or considered in evaluating Mr. Walgren's innocence or guilt.

Glasser v. United States, 315 U.S. 60, 74 (1942); Fed. R. Evid. 801(d)(2)(e). Neither the trial court nor the Court of Appeals ever analyzed separately the evidence against petitioner Walgren. The jury did not share the inability of the trial and appellate courts to distinguish petitioner Walgren's complicity from that of his co-defendants. Mr. Walgren was found guilty of only three counts against him, while Gallagher was convicted of fourteen counts and Bagnariol of nine.

Failure to distinguish between petitioner Walgren and his co-defendants damns Walgren for acts he did not commit and words he never spoke. The evidence against co-defendants Gallagher and Bagnariol was far more substantial than the case against Mr. Walgren. The jury listened to tape recordings of Mr. Gallagher's suggestion that each of the three defendants be given six percent of

the So-Cal profits upon legalization of gambling in Washington. Mr. Gallagher accepted numerous cash payments from undercover FBI agent Harold Heald, who posed as the representative of the fictitious So-Cal. Mr. Bagnariol was more circumspect, but even he accepted a $5,000 cash payment from one of the undercover FBI agents. Mr. Walgren never accepted any money, and only received a campaign contribution in the form of press clippings worth less than $90.

The facts recited in this petition for certiorari are based upon the interpretation of the evidence that is most favorable to the government, Glasser, 315 U.S. at 80, but are limited to evidence against petitioner Walgren.

C. Tape Recorded Statements By Petitioner Walgren.

The indictment against petitioner Walgren and his co-defendants arose out

of a federal sting operation (called Gamscam). The operation lasted twenty-two months. Most of the government's evidence at trial consisted of conversations of meetings and telephone calls with the defendants secretly taped by the undercover agents. It is difficult to summarize and characterize Mr. Walgren's tape recorded conversations with agent Heald. The conversations are disjointed and virtually incoherent, and are quoted more fully later in this petition, under the fourth reason for granting review.

The first two meetings between petitioner Walgren and undercover agent Heald were not recorded. The third meeting was recorded, but the parties did not discuss any remuneration for their efforts to change the gambling laws. (Ex. 17A) In their next meeting, the agent told petitioner Walgren that a Cayman Islands corporation "might be a . . . a . . . a good

way to . . . to handle, you know, your interest in the thing, but, I don't know." (Ex. 20A at 26) Petitioner Walgren replied, "Well, actually, you know, all those things are speculation at best, I suppose." (Ex. 20A at 27)

Petitioner Walgren again met with the FBI agents several months later. Agent Heald obliquely referred to "that six percent." Petitioner Walgren replied that, "I'm sure that, ah, all those things can be discussed -- and will be." (Ex. 44A at 67)

One month later agent Heald again extolled the virtues of a Cayman Islands bank account. (Ex. 48A at 162-63) Petitioner Walgren stated:

> WALGREN: Well, let me just say this, uh . . . I would much rather proceed with the commitment that I have to see that the thing has been done even if it meant that I got nothing out of it. And I'm not advocating that.

HEALD: Yeah. Yeah.

WALGREN: But, I can assure you of that. But . . . but, I'd rather have that happen than to have anybody get into difficulty with it.

(Ex. 48A at 160-161)

In a subsequent meeting, agent Desvernine attempted to commit petitioner Walgren to a percentage interest. Mr. Walgren replied that "there are a variety of methods that can fit," and that no specific contract or understanding was necessary. (Ex. 83A at 31-32, 34-35)

Several months later agent Heald suggested paying Walgren several thousand dollars a month. (Ex. 87A at 9) Walgren replied that, "I think that may be dangerous." (Ex. 87A at 10) The agent finally counted out $2,000 and handed it to petitioner Walgren. Mr. Walgren rejected the money, saying, "Well, my suggestion is that you hold onto that for a while." (Ex. 87A at 68)

D. Statements Found Only In Jencks Act Materials.

Petitioner Walgren's first meeting with agent Heald on November 8, 1978 was not recorded. Agent Heald suggested that they defer until later any discussion of money. The meetings on February 13 and July 27, 1979 were recorded. However, the tape recorder malfunctioned both times petitioner Walgren is said to have agreed to a six percent share.

The critical conversations were included in agent Heald's FBI interview report form FD-302. These formal reports were provided to the defendants under the Jencks Act and were included in the record as Defendants' Exhibit 11. Agent Heald admitted that he reviewed these formal 302 reports before trial and memorized portions of the reports.

The defendants were provided only with the final typewritten version of the

302 report. The defendants asked also for the agent's rough notes and for any prior drafts of the 302 forms. The trial court held that the agent's rough notes and drafts were not "statements" under the Jencks Act. (Appendix B-4)

The agent testified that he had destroyed prior drafts of his formal 302 reports and that the drafts and final reports were "the same in substance." The trial court never held an evidentiary hearing to determine whether additional rough notes existed other than the preliminary drafts of the formal 302 reports. Nor did the trial court attempt to determine whether the destroyed preliminary drafts were in fact "the same in substance" as the formal typewritten 302 reports.

There is reason to believe that agent Heald prepared rough notes prior to preparing a draft 302. Heald testified

that after his first meeting with Mr. Walgren, he prepared notes on the same day. Heald's 302 report, however, recites on its face that it was "dictated" five days after the meeting and transcribed fourteen days after the meeting. (Def's Ex. 11) (Agent Heald testified that he did not actually dictate the draft 302's, but wrote them out longhand.) The report is four pages long, recites chronology to the very minute, and purports to contain direct quotes by the defendants. It is unlikely that the agent could have prepared such a lengthy and detailed report five days after the incident without some preliminary notes.

The 302 report for November 8 is not unusual. Many of agent Heald's 302 reports purport to have been prepared at least one week after meeting with one or more defendants, precisely recite chronology, and include verbatim quotations.

(E.g., Def's Ex. 11, 7/12/78, 12/04/78, 7/23/79)

The Ninth Circuit affirmed the trial court holding that the rough notes and drafts were not "statements" under the Jencks Act. (Appendix A-43-46) The court also held that there was no reason to believe that there was any difference between agent Heald's drafts and the final 302 report, apparently overlooking the fact that the trial court never addressed this issue.

E. Evidence Of Travel Act Violation Under Count XVII.

Petitioner Walgren was convicted of two substantive violations, Counts XVII and XXIV. The violation of RICO resulted from the two substantive counts. Count XVII alleged that petitioner Walgren on January 30, 1980, caused agent Heald to use the telephone in interstate commerce "from Portland, Oregon" to Washington

state with the intent to promote and carry on bribery in violation of state law and extortion in violation of federal law.

The Government produced the following facts to show that the telephone call was interstate.

On January 30, 1980, petitioner Walgren telephoned agent Heald at his residence in Portland, Oregon. The phone was answered by a "Code-A-Phone" recording device. Mr. Walgren's name and telephone number were left as a message. The agent returned the call later that day.

The agent's Code-A-Phone was so equipped that he could pick up messages from it by simply calling in from another telephone. The agent did this on a regular basis, no matter where he was, in order to pick up messages from the Code-A-Phone. He was asked whether he remem-

bered from where he called Walgren and responded:

> I don't. Probably it was my residence. I'm not sure.

Heald made telephone calls from Vancouver, Washington, from Portland, Oregon, from Everett, Washington, from the United States Attorney's Office in Seattle, and from other locations. He would lead Walgren to believe that he was in Portland even when he was calling from within the state of Washington.

Defendants asked for copies of long-distance charges on calls made by agent Heald, but the government never provided them.

F. Evidence Of Mail Fraud Under Count XXIV.

Petitioner Walgren's candidacy for state Attorney General was supported by a citizens committee, "Citizens for Gordon Walgren." Count XXIV charged Mr. Walgren with knowingly causing the citizens' com-

mittee to mail a false report to the Public Disclosure Commission. The government alleged that the report was false because it failed to include the value of press clippings sent to Walgren by agent Heald in January, 1980. The press clippings cost less than $90.

The committee treasurer was required to report any contribution which the committee received. The treasurer was also responsible for reporting contributions which Mr. Walgren received directly, if the treasurer was aware of the contribution. The treasurer was unaware of agent Heald's contribution of the press clippings to Mr. Walgren. Nonetheless, the trial and appellate courts rejected Mr. Walgren's argument that the treasurer reported all contributions of which he was aware and that the report was therefore accurate.

G. One Juror Independently Researched The Existence Of The Fictitious FBI Company And Reported His Erroneous Findings To The Jury.

Petitioner Walgren testified at trial that his dealings with the undercover agents were not improper in any way. Mr. Walgren believed that the fictitious FBI company So-Cal was a legitimate business, and his interests in talking to the representatives of So-Cal were also legitimate.

During the trial juror Paul Cohen went to the Seattle Public Library and briefly examined Dun & Bradstreet and two other publications to determine if So-Cal was listed as a legitimate corporation. On the second of the nine and a half days of jury deliberation, Cohen told his fellow jurors that So-Cal was not "shown in the publications which I would normally check and I would be surprised that people such as the defendants, being wise

businessmen as they were, wouldn't have found out likewise."

Following the verdict, the defendants discovered juror Cohen's misconduct and moved for a mistrial. The defendants submitted an affidavit showing that juror Cohen's findings were erroneous. The Dun & Bradstreet publication in the business section of the Seattle Public Library does contain a listing of a firm called "So-Cal Commercial" of Los Angeles, California. Dun & Bradstreet also publishes a service listing approximately sixty companies whose names commence with So-Cal or So Cal. A majority of those firms are from California.

The trial court denied the motions for mistrial.

REASONS FOR ALLOWING THE WRIT

1. THE COURT SHOULD ALLOW THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN CHAPMAN v. CALIFORNIA, 386 U.S. 18 (1967).

This Court held in Chapman v. California, 386 U.S. 18, 24 (1967) that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." This Court has never had occasion to apply the Chapman standard to juror misconduct, but has applied Chapman generally to error of constitutional dimension. Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969).

The decision of the Ninth Circuit in this case conflicts with Chapman because the Ninth Circuit failed to apply the Chapman standard to juror Cohen's misconduct. This Court should grant the

writ to make clear that a conviction must be reversed unless the reviewing court can declare beyond a reasonable doubt that juror misconduct was harmless. This is a recurring issue, as evidenced by the eight circuit court cases since 1980 which are analyzed in the decision below. (Appendix A-24-32) It is an important issue because juror misconduct strikes at the heart of a defendant's Sixth Amendment rights to trial by impartial jury, confrontation of witnesses, and assistance of counsel.

The Court of Appeals applied the wrong standard in this case, affirming because the juror misconduct "did not so affect the appellants' right to a fair trial that it requires reversal." (Appendix A-40-41) This approach, asking whether the error requires reversal, is antithetical to Chapman. Chapman asks whether the error was so harmless beyond

a reasonable doubt that affirmance is required.

The Ninth Circuit held that reversal was not required for the following reasons: reliance upon the trial court's discretion in denying a new trial; juror Cohen's research was not strictly relevant; the "overwhelming" evidence against the defendants; and the trial court's daily admonition to consider only evidence produced at trial. (Appendix A-33-40) These reasons miss the mark. The appellate court cannot rely on trial court discretion, but must review the jury misconduct and declare the appellate court's own conviction that the error was harmless beyond a reasonable doubt. Harrington, 395 U.S. at 254. The test is not legal relevance, but the probable impact of the misinformation on any juror. Id. The information was obviously of sufficient importance that juror Cohen

took the effort to do the research. The judge's daily admonition is of dubious significance, since juror Cohen felt free to disregard it.

Finally, the conclusion that there was overwhelming evidence of guilt may be true of co-defendants Gallagher and Bagnariol, but it is simply erroneous as to petitioner Walgren. The jury deliberated for nine and one-half days and was especially concerned about petitioner Walgren. During deliberations, the jury asked to hear tapes of twenty-six meetings and telephone conversations. Twenty-four of these related to Mr. Walgren. Only four were for meetings or conversations dealing primarily or exclusively with the co-defendants. Mr. Walgren was ultimately acquitted on five counts and the jury failed to reach a verdict on five others. If anything is obvious, it is that the jury had substantial diffi-

culty in reaching a verdict as to petitioner Walgren.

The court should allow the writ to make clear that the Chapman standard applies to juror misconduct and to correct the conflict between Chapman and the decision of the Ninth Circuit in this case.

2. THE COURT SHOULD ALLOW THE WRIT TO MAKE CLEAR THAT FEDERAL COURTS AS WELL AS STATE COURTS MUST APPLY THE STANDARD OF REVIEW ARTICULATED IN JACKSON v. VIRGINIA, 443 U.S. 307 (1979), WHETHER ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

This Court recently established the standard of review in a federal habeas corpus proceeding upon a state prisoner's claim of insufficient evidence to support the state criminal conviction. Jackson v. Virginia, 443 U.S. 307 (1979). Jackson held that "the relevant question is whether, after viewing the evidence in

the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. The majority held that this standard has traditionally prevailed in federal criminal prosecutions, 443 U.S. at 317 and n. 10, but three members of the court disagreed. 443 U.S. at 328-29. (Stevens, J. concurring)

This Court has never considered the application of Jackson to a federal criminal prosecution. This case provides an ideal vehicle for doing so, because this case illustrates well the distinction between proof beyond a reasonable doubt and "any evidence that is relevant -- that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence." Jackson, 443 U.S. at 320.

No rational trier of fact could find beyond a reasonable doubt that the telephone call charged in Count XVII was interstate. Petitioner questions whether agent Heald's testimony would be adequate even in a civil case; it certainly does not rise to proof beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 363 (1970), quoting from W. v. Family Court, 24 N.Y.2d 196, 205, 247 N.E.2d 253 (1969) (Fuld, C.J., dissenting).

The Ninth Circuit Court of Appeals purported to apply the Jackson standard of review to Count XVII. (Appendix A-71) The court pointed to two scintilla of circumstantial evidence which tended to support the conclusion that agent Heald made the call from Portland, Oregon. The Court of Appeals reasoned that, "the content of the conversation, which was recorded, clearly implies that the call originated from a distant location

south of Olympia, Washington." (Appendix A-72) This observation simply ignores the geography of western Washington. Agent Heald called Mr. Walgren from Vancouver, Washington on several occasions. Indeed, the investigation which led to this proceeding commenced in Vancouver. Vancouver, Washington, is separated from Portland, Oregon, by the Columbia River. Both cities could be said to be "at a distant location south of Olympia."

The Court of Appeals also observed:

> The evidence suggests that Heald was in Portland on January 29 and established that he was in Portland on January 31. That Heald was there on January 30 as well is not an irrational conclusion.

(Appendix A-73) Under this reasoning, any rational conclusion is sufficient to satisfy the government's burden of proof. The Court of Appeals has completely eliminated the requirement that the "rational

conclusion" must follow beyond a reasonable doubt.

Unlike Jackson v. Virginia, this is a case in which it makes a difference whether the appellate court seriously applies the requirement of proof beyond a reasonable doubt. This Court should allow the writ and clearly hold that the Jackson standard must be applied in federal criminal prosecutions.

3. THE COURT SHOULD ALLOW THE WRIT IN ORDER TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW, WHETHER A GOVERNMENT AGENT'S ROUGH NOTES OF A MEETING WITH THE DEFENDANT CONSTITUTE A STATEMENT OF THE AGENT WHICH THE GOVERNMENT MUST PRESERVE AND PRODUCE UNDER THE JENCKS ACT.

The Jencks Act requires the government to produce any statement of a witness in the possession of the government on motion of the defendant. 18 U.S.C. § 3500(b). A "statement" includes "a written statement made by said witness and signed or otherwise adopted or ap-

proved by him." 18 U.S.C. § 3500(e)(1). This Court has never decided whether rough notes made by a government agent during an investigation constitute a "statement" of the government agent. The issue was presented but not decided in Campbell v. United States, 373 U.S. 487, 491 n. 5 (1963).

The circuit courts of appeal have failed adequately to analyze this issue and their decisions are in confused disarray. This Court should accept review to settle this question and provide the clear guidance needed by law enforcement agencies. In so doing, the court should protect the right of a criminal defendant to discovery of unedited and often valuable statements included in rough notes.

This issue may arise in two different contexts. When a government witness has been interviewed by a government agent, the question arises whether the

witness "adopted or approved" the government agent's rough notes. This was the issue in Campbell and in Goldberg v. United States, 425 U.S. 94 (1976). As Justice Stevens observed in his concurring opinion in Goldberg, Congress inserted the "adopted or approved" requirement to insure that the statement "reflects the witness' own words fully and without distortion." 425 U.S. at 112.

This concern is absent in the second situation, when the defendant seeks to impeach the very government agent who prepared the rough notes. Every word is obviously the agent's, and there is no possibility of selectivity or "the conscious or inadvertent infusion of the recorder's opinions or impressions." Palermo v. United States, 360 U.S. 343, 352 (1959). It follows that a government agent's rough notes are always a statement of the agent.

The circuit courts of appeal have analyzed an agent's rough notes in a number of different ways, but have generally overlooked the fact that the rough notes of an agent are always statements of the agent. The District of Columbia Circuit has held that rough notes of investigations must always be preserved. United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975).

The Third Circuit similarly required preservation of all rough notes in United States v. Vella, 562 F.2d 275 (3d Cir. 1977), cert. denied, 434 U.S. 1074 (1978), but subsequently held that an agent's rough notes are only a statement if the agent has somehow "adopted or approved" the notes. United States v. Walden, 578 F.2d 966 (3d Cir. 1978), on appeal from remand, 590 F.2d 85 (3d Cir.), cert. denied, 444 U.S. 849 (1979). The Ninth Circuit originally held that

all rough notes must be preserved, United States v. Harris, 543 F.2d 1247 (9th Cir. 1976), then held that an agent's rough notes are not statements of the agent in United States v. Bernard, 623 F.2d 551 (9th Cir. 1980), and in petitioner Walgren's case.

The Fifth Circuit has held that an agent's rough notes were neither statements of the third-party government witness, United States v. Judon, 581 F.2d 553 (5th Cir. 1978), nor of the agent. United States v. Martin, 565 F.2d 362 (5th Cir. 1978). The Eighth Circuit has held that a government agent's diary is not a statement of the agent. Canady v. United States, 354 F.2d 849 (8th Cir. 1966). The Second, Sixth, Seventh and Tenth Circuits have simply held that destruction of an agent's rough notes is not prejudicial error. United States v. Stulga, 584 F.2d 142 (6th Cir. 1978);

United States v. Lane, 574 F.2d 1019 (10th Cir.), cert. denied, 439 U.S. 867 (1978); United State v. Mase, 556 F.2d 671 (2d Cir.), cert. denied, 435 U.S. 916 (1977); United States v. Harris, 542 F.2d 1283 (7th Cir. 1976). The First Circuit has never decided the issue. United States v. Lieberman, 608 F.2d 889, 896 n. 13 (1st Cir. 1979), cert. denied, 444 U.S. 1019 (1980).

Judicial admonitions to the FBI to preserve rough notes are hollow indeed when the agency consistently disobeys such mandates, as the FBI did in this case, and the courts then hold that such notes are not statements anyway. An agent's rough notes, unfiltered by pre-conceived notions, editorialization, or selective memory, are surely the most accurate and helpful document for cross-examination of the agent when the agent takes the stand.

The agent's rough notes were particularly important in this case, since the formal 302 reports formed such an important part of the case against petitioner Walgren. Petitioner Walgren's tape-recorded statements were all vague and non-committal in contrast to the unequivocal commitments related in the 302 reports. Agent Heald relied heavily on the 302 reports in his testimony at trial. Rough notes made immediately after the meetings might have shown that Heald embellished and mischaracterized Walgren's statements.

The Ninth Circuit pointed out that there was no showing that the rough notes differed from the formal 302 reports. This reliance is misdirected because, "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his

defense." Jencks v. United States, 353 U.S. 657, 667 (1957). Moreover, the trial court never held an evidentiary hearing on this question and the appellate court was not in a position to decide the matter. Campbell, 373 U.S. at 493. In any event, agent Heald never testified at all concerning his rough notes of the meetings. Heald simply testified that the early drafts of the formal reports were identical to the final reports.

This Court should allow the writ to determine whether a government agent's rough notes of an investigation are Jencks Act statements and to resolve the confusion among the circuits. If rough notes are statements, this matter should be remanded to the trial court for an evidentiary hearing to determine whether rough notes were made, whether the notes still exist, the differences between the

rough notes and the formal 302 reports, and appropriate sanctions for destruction of any notes.

4. THE COURT SHOULD ALLOW THE WRIT TO CONSIDER AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW, WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PRECLUDES A CRIMINAL PROSECUTION WHERE GOVERNMENT AGENTS HAVE REPEATEDLY ENTREATED A RELUCTANT DEFENDANT TO VIOLATE THE LAW.

This Court has held that there may be situations "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Russell, 411 U.S. 423, 431 (1973); see also Hampton v. United States, 425 U.S. 484, 489 (1976). The Court has never reviewed a case in which the conduct of government agents was so extreme that the due process clause barred prosecution, and so has never defined the boundaries of the doc-

trine. Nor has the Court ever confronted this doctrine outside the realm of contraband offenses. Hampton, 425 U.S. at 493 (Powell, J. concurring).

The Court should grant the writ and hold that prosecution is barred where government agents have repeatedly importuned a reluctant defendant to engage in criminal conduct. This case is peculiarly well suited for consideration of due process limits on the conduct of government agents. The undercover agents pursued petitioner Walgren for twenty-two months. Of their forty-eight contacts with petitioner Walgren, Mr. Walgren initiated only five telephone calls, two of which were return calls in response to messages from the agents. Petitioner Walgren initiated contact with the agents only in the final four months of the operation, having resisted eighteen months of government overtures.

The government agents could not establish that petitioner Walgren acted improperly unless they could prove that Mr. Walgren requested, accepted, or agreed to accept "any pecuniary benefit pursuant to an agreement or understanding" that his vote would "be used to secure or attempt to secure a particular result in a particular matter." Wash. Rev.Code 9A.68.010(1). Petitioner Walgren did not request or accept any pecuniary benefit until nineteen months into the investigation when he asked for press clippings on potential opponents in his race for attorney general.

Throughout the investigation Walgren rebuffed the agents' attempts to gain his agreement to accept a six percent share of the profits of So-Cal. Agent Heald reported the following exchange in his formal 302 report for his second meeting with petitioner Walgren.

> UCSA [agent Heald] then asked WALGREN if he was satisfied with the 18 percent. He advised that he was. WALGREN then asked UCSA how UCSA intended to set up the business. UCSA suggested that it would look better if each cardroom was a separate entity, or business. WALGREN agreed. UCSA then told WALGREN that since he is an attorney, he should provide some suggestions as to how they might want to handle their percentage. WALGREN did not reply to the question.
>
> WALGREN then stated, "Look. I really do not know you very well. I've only met you a couple of times, so let me tell you, I believe in gambling, and my constituents do too. So I will be changing legislation for my constituents." UCSA then said, "If we own cardrooms in Washington, then we would be your constituents?" WALGREN replied, "That's right."

(Def's Ex. 11, 2/13/79)

Realizing that this exchange fell short of establishing an agreement, agent Heald two months later again inquired how the six percent should be handled and suggested a Cayman Island corporation. (Ex. 20A at 26) Petitioner Walgren re-

plied that, "all those kinds of things are speculation at best, I suppose." (Ex. 20A at 27)

Three months later co-defendants Bagnariol and Gallagher and agent Heald contemplated abandoning their efforts to include petitioner Walgren because, as Bagnariol observed, "We don't need him." (Ex. 41A at 10) Co-defendant Gallagher stated:

> I agree with John [Bagnariol]. Now if he should . . . if he should want . . . you know, if he should make overt moves to be a part of it, then this might be a little bit, uh, . . . a little bit difficult. But so far up to now, he hasn't done anything.

(Ex. 41A at 11)

Three days later, agent Heald renewed his overtures to Walgren:

> HEALD: We talked . . . we talked, you know, a long . . . a long time ago when we got together for lunch and whatnot and, ah, you know, if . . . if you can handle your side --

which we need -- you know, that six percent is still yours and, uh . . .

WALGREN: Well, I'm sure that, ah, all of those things can be discussed -- and will be.

(Ex. 44A at 67)

Several weeks later Heald told Mr. Walgren that, "we'll stand by our initial deal you know." (Ex. 48A at 158) Mr. Walgren observed:

WALGREN: Well, let me just say this, uh . . . I would much rather proceed with the commitment that I have to see that the thing has been done even if it meant that I got nothing out of it. And I'm not advocating that.

HEALD: Yeah. Yeah.

WALGREN: But, I can assure you of that. But . . . but, I'd rather have that happen than to have anybody get into difficulty with it.

HEALD: Yeah. Yeah.

WALGREN: By a long ways, I don't want to see any problems. Okay. Now, on the other hand, if we can not only put the thing together. And . . . and I have no . . . I have no

> conscience or philosophical hang-up on it. I happen to think that it's not a bad deal.
>
> HEALD: Yeah.
>
> WALGREN: Okay. and if at the same time we can . . . we can also . . . everybody gains some benefits, hopefully some substantial benefits, I'll be right up there, too. Uh, but, uh, I don't want to have anybody taking any chances simply on, ah . . . I mean, on your side, particularly when you have that kind of a comm . . . commitment. If it's gonna cause any problems, I (unintelligible).

(Ex. 48A at 160-61)

Several months later undercover agent Desvernine again asked petitioner Walgren to commit to a percentage of the profits:

> DESVERNINE: Uh, we've talked about a, uh, percentage breakdown in the past, you know, for help. And, uh, you aware of this? You've discussed this, haven't you with Hal? I don't know, how does that sit with you? Is that, uh, logical with you, or . . .

> **WALGREN:** I think that there are a . . . a variety of methods that, uh, can fit.

(Ex. 83A at 31) Mr. Walgren again disavowed any specific agreement or understanding:

> **WALGREN:** I'm not so much concerned about whether tonight, or tomorrow, or next week, or next month we sit down and say, almost in contract form, "This is the way it's gonna be." I don't really know that I worry about that.
>
> **DESVERNINE:** Mm hmm.
>
> **WALGREN:** I'd rather have an understanding with all those that might . . . might be involved that, uh . . . that, uh, uh, we will, uh, participate. Now . . . now, then the question comes in one's mind while I'm . . . if we di... If we don't understand what that participation is, somebody's gonna be upset about it. No, that . . . As far as I'm concerned, I'm not gonna be upset about it.
>
> **DESVERNINE:** Oh, no I understand that.
>
> **WALGREN:** (Clears throat) So, I (unintelligible). I think that there's a lot of things that, uh . . . that, uh, you're

> interested in that, uh . . . that I am, too, and I think are consistent with, uh, correct activities on the part of the state.

(Ex. 83A at 34-35)

One month later agent Heald again attempted unsuccessfully to implicate petitioner Walgren in bribery. Heald counted out $2,000 and handed it to Mr. Walgren. Walgren refused the money, stating, "My suggestion is that you hold onto that for a while." (Ex. 87A at 68)

Agent Heald telephoned Walgren less than a month later. Mr. Walgren asked Heald to order a newspaper clipping service on Mr. Walgren's potential opponents for the office of attorney general. (Ex. 91A at 5) The clipping service formed the basis for Mr. Walgren's conviction on Count XXIV.

The government's conduct of this operation was egregious. Government agents approached Mr. Walgren with a

ready-made scheme of bribery. They persisted in their entreaties in the face of Mr. Walgren's continuing resistance. Only after one and a half years of continued entreaties did Mr. Walgren solicit a campaign contribution from the agents. The agents' persistence in designing a criminal scheme and implicating Walgren in their scheme is so outrageous that the Fifth Amendment must bar prosecution of this offense.

Petitioner Walgren did not argue at trial and does not argue now that he was entrapped into committing any offense. Nor does Mr. Walgren concede that he was predisposed in any way to commit any offense. The jury was instructed on entrapment upon the request of one of the co-defendants. Moreover, any inquiry into Mr. Walgren's predisposition to join the alleged conspiracy was meaningless in

light of the Government's outrageous conduct of this investigation.

This Court should grant the writ to define the Fifth Amendment limitations upon prosecution when government agents repeatedly entreat a reluctant defendant to engage in criminal conduct.

5. THE LEGALLY REQUIRED MAILING OF AN ACCURATE PUBLIC DISCLOSURE FORM BY THE TREASURER OF A POLITICAL COMMITTEE DOES NOT CONSTITUTE A MAILING UNDER THE MAIL FRAUD STATUTE.

Petitioner Walgren asks the court to review this issue in the event that review is granted on any other issue. Petitioner will argue that the public disclosure report cannot support a mail fraud conviction because the report was required by law and was accurate. Parr v. United States, 363 U.S. 370 (1960).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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March 23, 1982

Supplemental Brief

Supreme Court, U.S.
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NO. 81-1779

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1981

GORDON L. WALGREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER GORDON L. WALGREN

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SUPPLEMENTAL QUESTION PRESENTED FOR REVIEW

Is proof of a pattern of racketeering activities sufficient proof of an "enterprise" under RICO, 18 U.S.C. §§ 1961, 1962?

REASON FOR FILING SUPPLEMENTAL BRIEF

Petitioner Gordon L. Walgren's Petition for Writ of Certiorari was mailed to this Court on March 23, 1982. On April 8, 1982, counsel for petitioner first became aware of the decision of the United States Court of Appeals for the Eighth Circuit in United States v. Bledsoe, No. 80-1998 (8th Cir., filed March 12, 1982). The decision of the Ninth Circuit in this case is in conflict with the decision of the Eighth Circuit in Bledsoe.

SUPPLEMENTAL REASON FOR ALLOWING THE WRIT

THE COURT SHOULD ALLOW THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN UNITED STATES v. BLEDSOE, NO. 80-1998 (8th Cir., filed March 12, 1982).

Petitioner Gordon Walgren was convicted of participating in an "enterprise" under RICO. The Court of Appeals held that the enterprise was adequately established by proof of a "pattern of racketeering activity":

> Gallagher suggests that the government relied solely on proof of the pattern of racketeering to establish the existence of the enterprise. Even if that were the case, the Supreme Court in Turkette recognized that "the proof used to establish these separate elements may in particular cases coalesce." 101 S. Ct. at 2528.
>
> In any event, as we note above, the government presented ample evidence to show the existence of an ongoing organization functioning as a continuing unit. See id. That the evidence sometimes consisted of

> conduct constituting the pattern of racketeering activity is irrelevant.

(Appendix, A-51-52)

The decision of the Court of Appeals conflicts with the recent decision of the Court of Appeals for the Eighth Circuit in United States v. Bledsoe, No. 80-1998 (8th Cir., filed March 12, 1982). The Eighth Circuit held in Bledsoe:

> Construing the statute to give effect to all its words, it requires an association with an enterprise which is distinct from participation in the conduct of the enterprise through a pattern of racketeering activity. In order for such association, for example, formal membership in or employment by a legitimate organization or their equivalent in a criminal group, to exist, the enterprise must be more than an informal group created to perpetrate the acts of racketeering.

Bledsoe, supra, Slip Opinion at 24.

The Court should grant review to resolve this conflict between the circuits. The government should not be

permitted to prosecute an individual under RICO, with its attendant enhanced penalties, unless the government can show some "enterprise" independent of the "pattern of racketeering" with which the defendant is charged.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit for the reasons stated in the original petition and for the reasons stated in this supplemental brief.

Respectfully submitted,

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April 14, 1982

Appendix

81-1779
81-1780

No. _____

Supreme Court, U.S.
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MAR 23 1982
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CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1981

GORDON L. WALGREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JOHN BAGNARIOL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PATRICK GALLAGHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CONSOLIDATED APPENDIX TO PETITIONS FOR CERTIORARI

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APPENDIX A

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN BAGNARIOL, Defendant-Appellant.	NO. 80-1820 D.C. No. CR 80-126-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GORDON L. WALGREN, Defendant-Appellant.	NO. 80-1821 D.C. No. CR 80-126-2
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PATRICK GALLAGHER, Defendant-Appellant.	NO. 80-1822 D.C. No. CR 80-126-3 OPINION

Appeal from the United States
District Court for the
Western District of Washington
Honorable Walter T. McGovern,
District Judge, Presiding
Argued and submitted
October 7, 1981

Before: BROWNING, Chief Judge, WRIGHT, Circuit Judge, and THOMPSON,* District Judge

PER CURIAM:

Appellants appeal convictions on various counts of a twenty-nine count indictment resulting from a two-year investigation by the Federal Bureau of Investigation into gambling and alleged political corruption in the state of Washington. Appellant John Bagnariol was convicted on nine counts, appellant Gordon Walgren on three counts, and appellant Patrick Gallagher on fourteen counts.

---

*Honorable Bruce R. Thompson, Senior Judge, United States District Court for the District of Nevada, sitting by designation.

Appellants challenge their convictions on numerous grounds. We conclude appellants' arguments are without merit and affirm the convictions for reasons which follow.

The government's evidence consisted principally of tapes of surreptitiously recorded conversations between government agents and appellants and testimony of government agents regarding such conversations. Factual recitals in this opinion are based upon the interpretation of this evidence that is most favorable to the government. Glasser v. United States, 315 U.S. 60, 80 (1942).

I. DUE PROCESS

At the request of local authorities, the FBI joined an investigation of local gambling and political corruption in Vancouver, Washington. FBI Agent Harold

Heald, posing as the representative of a fictitious California corporation named "So-Cal," led the undercover operation. State undercover agents introduced Heald to Don Buss, the owner of several card-rooms authorized under Washington law to conduct cards games financed by the players. Heald represented to Buss that So-Cal was interested in purchasing card-rooms and also in participating in "house-backed" gambling if it were legalized in Washington. Heald expressed a desire to meet local political leaders to assure that legalized gambling would be expanded in Washington and that So-Cal's entry into it would not be opposed.

Buss introduced Heald to appellant Gallagher, a lobbyist and the secretary of the Cardroom Owners Association. Heald repeated So-Cal's interest in buying into and expanding legalized gambling and inquired into the current political

climate for gambling legislation. Gallagher responded that legislation to expand gambling would be passed gradually, noting that appellant Bagnariol, Speaker of the Washington House of Representatives, was in favor of gambling legislation. Gallagher offered to introduce Heald to several "powerful political figures" who intended to expand and control legalized gambling in Washington and who could make Heald "certain assurances." Gallagher explained that direct bribes and payoffs were no longer used and that "some of the biggest hoods in the state are now running the state" because "they, in effect, could do better by being politically at the top and running things legally." Gallagher suggested Heald hire him to serve as So-Cal's public relations man and as liaison with state politicians.

Heald initiated the next several

meetings with Gallagher. Gallagher assured Heald that he could advance So-Cal's interests through "modern corporate ways" rather than "old fashioned thug ways," stating, "You don't buy people anymore, you rent 'em." Heald responded that So-Cal was prepared to pay whatever was necessary. Gallagher said legalized gambling was coming to Washington and it was his job to make sure his friends controlled it. Gallagher identified Bagnariol as one of these friends. When asked how much money would be required, Gallagher said his friends would determine the amount, and would also guarantee the desired results.

Gallagher and Heald met periodically over the next five months. They negotiated an agreement under which appellants would assure passage of legislation legalizing gambling, appellants and So-Cal would control the legalized gambling,

and each appellant would receive six percent of So-Cal's gambling profits. Gallagher then introduced Heald to Bagnariol and Walgren. Both expressed familiarity with the negotiations between Gallagher and Heald and assented to the terms upon which they had agreed.

Appellants Gallagher and Walgren argue that, notwithstanding proof they were predisposed to commit the crimes, the government's initiation of and involvement in the operation constituted "outrageous conduct" that violated their fifth amendment due process rights.

In Greene v. United States, 454 F.2d 783 (9th Cir. 1971), the court recognized a due process defense based on excessive police involvement in the crime for which defendants were convicted. We reversed conspiracy and bootlegging convictions against defendants predisposed to commit these offenses because of the govern-

ment's direct and continuous involvement over a long period of time in the creation and maintenance of the illegal distilling operation. The government's conduct amounted to "creative activity, substantially more intense and aggressive than the level of such activity charged against the Government in numerous entrapment cases we have examined." Id. at 787 (citation omitted).

In United States v. Russell, 411 U.S. 423 (1973), the Supreme Court reversed a decision of this court applying Greene to reverse convictions for manufacturing and selling a controlled substance. The defendant had been operating a "speed" manufacturing laboratory when a government agent joined the operation and provided an ingredient essential to the manufacturing process. The Supreme Court held the entrapment defense unavailable because the defendant

conceded predisposition to commit the offense. The Court also held that on the facts there was no defense based upon a violation of due process by the government. However, the Court's language did not clearly reject the possibility that such a defense might exist:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952), the instant case is distinctly not of that breed. [The agent's] contribution of propanone to the criminal enterprise already in progress was scarcely objectionable. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.

Id. at 431-32.

The possibility of a due process defense based on the extent of government

involvement in the commission of the offense also survived the Court's review in Hampton v. United States, 425 U.S. 484 (1976). In Hampton, the Court affirmed a trial court's refusal to instruct the jury that the defendant could not be convicted if the jury found the government had supplied the defendant the illegal narcotic, which the defendant then sold to government agents. The plurality opinion, written by the author of Russell and representing the views of three Justices, would have foreclosed a due process defense based on government involvement if the defendant was predisposed to commit the crime. Id. at 490. The two concurring Justices found it unnecessary to decide whether predisposition precludes a due process defense as well as the entrapment defense, leaving that question open. Id. at 492-95 (Powell, J., concurring).

Three dissenting justices also declined to decide the constitutional issue. Id. at 497 (Brennan, J., dissenting). As this court has said, "Hampton left open the possibility that the conviction of a predisposed defendant may be reversed where the government's involvement in the criminal scheme reaches such an outrageous level as to violate due process." United States v. Gonzales-Benitez, 537 F.2d 1051, 1055 (9th Cir.), cert. denied, 429 U.S. 923 (1976). See United States v. Prairie, 572 F.2d 1316, 1319 & n.3 (9th Cir. 1978).

Although excess government involvement in a criminal enterprise may give rise to a due process offense, the courts rarely have found the defense available. The Supreme Court has never reversed a conviction on this ground. We have not done so since Greene. "This court has emphasized that the due process channel

which Russell kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." United States v. Ryan, 548 F.2d 782, 789 (9th Cir. 1976), cert. denied, 430 U.S. 965 (1977). See United States v. Smith, 538 F.2d 1359, 1361 (9th Cir. 1976).

The government set Heald up as "bait" by spreading word generally that So-Cal was interested in promoting gambling legislation and in meeting politicians who shared that interest. This tactic led Heald to Gallagher, who volunteered the services of Bagnariol and Walgren. Gallagher stated that appellants planned to expand gambling gradually while maintaining control over its operation and were looking for the proper vehicle in which to vest that control.

The government, through So-Cal, pro-

vided that vehicle. Once the government had set its bait, appellants responded without further inducement by the government, joined with Heald in an equal partnership, and offered as their contribution the passage of necessary legislation in exchange for a portion of the proceeds from expanded gambling. It would be extreme to characterize the government's involvement as outrageous or shocking to the sense of justice.

The few convictions to be reversed on due process grounds have resulted from governmental involvement far more egregious than that presented here. In United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), the Third Circuit found "a demonstrable level of outrageousness" justifying reversal on the following facts: At the direction of the government, an informant called the defendant, with whom the informant had previously

manufactured "speed," and suggested they establish a laboratory to manufacture the drug. The government provided the chemicals, the equipment, and the site. The informant was in complete charge of the production process. The defendants' assistance was minimal and at the specific direction of the informant. Id. at 380-81. Despite the defendant's clear predisposition, his conviction was reversed:

> This egregious conduct on the part of government agents generated new crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs. Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred.

Id. at 381 (footnote deleted).

Based on Twigg, the Eastern District of Pennsylvania recently acquitted two

subjects of the "Abscam" undercover operation. United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980) (appeal pending). The court found as a matter of law that the defendants had no predisposition to commit the offenses, and had been entrapped by the government. Id. at 1200. The court further found that the governmental involvement violated due process even if defendants were predisposed to commit the crimes. Id. at 1204-05. Government agents had posed as representatives of an Arab sheik who desired to build a hotel complex in Philadelphia. The defendants, members of the City Council, agreed to assist the project because it would benefit the city. Government agents offered bribes as an additional inducement. Defendants had not requested money, and had made it clear none was necessary. The agents insisted the sheik would be unwilling to

proceed with the project unless the payments were accepted. Defendants accepted the money, but did not agree to do anything inconsistent with their obligation to promote the interests of the city. 501 F. Supp. at 1200.[1/]

The government's conduct in the present case does not rise to the level of outrageousness reflected in Twigg and Jannotti. Treating the evidence in the light most favorable to the government, as we must, we find the government's involvement reflected neither the dominant formentation of Twigg nor the aggressive solicitation of Jannotti.[2/]

If the conduct of the government was in some respects overzealous, it was clearly not "so grossly shocking and so outrageous as to violate the universal sense of justice." United States v. Ryan, 548 F.2d at 789. The convictions do not violate due process.

II. JUROR MISCONDUCT

The Seattle public library is located across the street from the United States Courthouse in which the appellants were tried. Juror Paul Cohen found the library a convenient place to pass his time.

While at the library during the trial or the early part of deliberations, Mr. Cohen decided to check business publications for a reference to the fictional company So-Cal. He found none, although he discovered corporations with similar names.

Cohen reported his library visit and the results of his investigation to some of the other jurors. It appears he told them that as a normally prudent person he would have investigated any organization with which he intended to do business and

that he found it odd appellants had not conducted a similar investigation.

The appellants learned of Cohen's actions after the guilty verdicts but before sentencing and moved for a mistrial. They contend that the belief in the legitimacy of So-Cal was a fundamental and integral part of their defense and that Mr. Cohen's research introduced material, essential, and improper evidence into the jury deliberations. They argue that the juror's independent research deprived them of a fair and impartial jury.

Upon learning of the library incident, the trial judge conducted evidentiary hearings, and the jurors were questioned individually. Questioning was intended to discover the nature of any extrinsic material, the extent of discussion, and other circumstances. The court attempted to avoid inquiry into the

subjective effects on the jury of Mr. Cohen's discovery.

After its investigation, the trial court concluded that the extrinsic evidence made available by juror Cohen's investigation could not have affected the verdict. Noting its daily instructions to the jury to consider only evidence produced at trial, the court determined that the extrinsic information added nothing to the evidence before the jury, that the government's evidence overwhelmingly established the guilt of each appellant, and that the absence of a listing for the company was irrelevant to any material issue in the case.

It is axiomatic that fundamental to the administration of justice is a fair and impartial jury. E.g., Turner v. Louisiana, 379 U.S. 466, 472-73 (1965); United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S.

818 (1977). The introduction of outside influences into the deliberative process of the jury is inimical to our system of justice. Remmer v. United States, 347 U.S. 227 (1954).

The jury should reach its decisions only upon the evidence produced at trial, unaffected by extrinsic facts. The sixth amendment demands that evidence material to the guilt or innocence of an accused be subject to judicial control and the rules of evidence. Turner v. Louisiana, 379 U.S. at 472-73.[3/]

Although important interests are at stake for both the public and the defendants, the trial judge in the first instance, and the appellate court on appeal, must consider allegations of juror misconduct using only that evidence properly subject to consideration. Fed. R. Evid. 606(b).[4/] Jurors may testify regarding extraneous prejudicial informa-

tion or improper outside influences. They may not be questioned about the deliberative process or subjective effects of extraneous information, nor can such information be considered by the trial or appellate courts. See United States v. Marques, 600 F.2d 742, 747 (9th Cir. 1979), cert. denied, 444 U.S. 1019 (1980).

The trial court, upon learning of a possible incident of juror misconduct, must hold an evidentiary hearing to determine the precise nature of the extraneous information. The defendant is entitled to a new trial if the judge finds a "possibility that the extrinsic material could have affected the verdict." United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979).

The trial judge is uniquely qualified to appraise the probable effect of information on the jury, the materiality

of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusion about the effect of the alleged juror misconduct deserves substantial weight. See Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir. 1980), cert. denied 101 S. Ct. 1749 (1981).

Nevertheless, because of the threat to the fundamental right of defendants to an impartial jury, the trial judge's determination must be considered in the context of the entire record. We conduct an independent review of the alleged juror misconduct, but remain mindful of the trial court's conclusions.

However simple it might be if every question on appeal could be solved by applying a per se test of some sort, that is not realistic.[5/] Cases in which

convicted defendants challenge their verdicts based on alleged juror misconduct require a considered review of the details and circumstances of each case. United States v. Marques, 600 F.2d 742, 747 (9th Cir. 1979), cert. denied, 444 U.S. 1019 (1980); United States v. Alessio, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976).

No bright line divides cases of juror misconduct that demand reversal from those that must be affirmed. But some similarities are discernible from cases in which convictions were reversed. Juror misconduct generally relates directly to a material aspect of the case. When finding reversible prejudice, courts have described a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, as distinguished from a connection that arises only by irrational reason-

ing. Finally, reviewing courts have looked more harshly upon a conviction when the trial court fails to conduct evidentiary hearings.

In one of the most recent cases to reverse for juror misconduct, Gibson v. Clanon, 633 F.2d 851 (9th Cir.), cert. denied, 101 S. Ct. 1749 (1981), jury members consulted a medical dictionary to determine the rarity of the defendant's blood type and the effect of a dosage of morphine on the ability of a witness to identify the defendant. The trial court conducted an evidentiary hearing and expressly concluded that he could not find the misconduct to be harmless beyond a reasonable doubt, but refused a mistrial on the erroneous belief that the correct standard was whether the extraneous evidence was more probably than not harmless. Noting that the evidence gathered by the jurors previously had

been ruled inadmissible, that it significantly bolstered the government's case, and that the evidence was crucial, we reversed.

In United States v. Renteria, 625 F.2d 1279 (5th Cir. 1980), defendant alleged that an entire tape recording was provided to the jury, but that only portions of it had been admitted. Because the trial judge had refused to conduct a hearing, the Fifth Circuit remanded to determine whether the jurors had heard prejudicial material. See also Osborne v. United States, 351 F.2d 111 (8th Cir. 1965).

A United States Deputy Marshal in United States v. Greer, 620 F.2d 1383 (10th Cir. 1980), explained to the jury the defendant's eligibility for sentencing under the Federal Youth Corrections Act. Finding such extraneous contact to be squarely within Supreme

Court precedent, Rogers v. United States, 422 U.S. 35 (1975); Remmer v. United States, 347 U.S. 227 (1954), the court reversed. The only effect of information about sentencing and punishment is improperly to influence the jury in its decision about guilt or innocence. 620 F.2d at 1386 (Doyle, J., concurring). It is presumptively prejudicial. Remmer v. United States, 347 U.S. 227 (1954).

In United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979), the court's official file was left in the jury room. It contained inadmissible evidence that the court had denied a motion to dismiss and that the defendant previously had been prosecuted for a similar offense. Noting the highly prejudicial nature of the extraneous information and the extent of the jurors' examination of the file, the court reversed.

While examining an admitted exhibit, a shirt belonging to the defendant, the jury in Farese v. United States, 428 F.2d 178 (5th Cir. 1970), found a large amount of cash in a pocket. Finding a "strong probability of prejudice to the defendant then on trial upon a charge involving unlawful monetary gain," the court reversed. 428 F.2d at 182.

After examining these cases, we could conclude simply that the juror misconduct alleged here does not rise to the level of the cases supporting reversal and affirm on that basis. But we recognize the dangers in drawing a line so high that meritorious cases will be foreclosed because of unreasoned prior conclusions. We said recently:

> Line drawing often creates artificial, discrete units where in reality a continuum exists. We should not be too quick to subject real situations to overreaching compartmentalization. Doing so only

> leads us farther down the road to absurdity, grasping more and more illogically for the distinctions which preserve the lines and compartments we initially created with such reverence. It is far more judicially honest to acknowledge the continuum and assert the genuine basis for our decision. In questions about jury incidents, we are ultimately not so concerned with their nature as with the prejudice they may have worked on the fairness of the defendant's trial.

United States v. Armstrong, 654 F.2d 1328, 1332 (9th Cir. 1981).

We continue, then, and examine the recent cases in which alleged juror misconduct have been found to be nonprejudicial. In United States v. Armstrong, 654 F.2d 1328 (9th Cir. 1981), a juror received telephone calls containing obscene language and veiled threats. The court affirmed the convictions, noting especially the better position of the district court to determine the existence or extent of any prejudice. The court

also considered significant that the calls were not material to the guilt or innocence of the defendants.

In United States v. Bassler, 651 F.2d 600 (8th Cir. 1981), a juror took notes on the testimony each day after the proceedings were concluded, even though the judge expressly instructed the jury not to do so. The juror also brought to the jury room notes from a book on rules of order. The court affirmed the conviction. It found the testimonial notes to be intrinsic to the deliberations, and determined that the material on rules of order was irrelevant to any material issue of the case.

In United States v. Johnson, 647 F.2d 815 (8th Cir. 1981), the court affirmed a conviction after the jury had heard unadmitted portions of a tape recording. The court concluded that the extraneous matter was irrelevant to any

issue in the case. 647 F.2d at 817.

The court found no prejudicial error in United States v. Bagley, 641 F.2d 1235 (9th Cir. 1981). The trial judge, responding to a question from the jury, informed the jurors that a government witness had not been immunized, information not admitted at trial. The reviewing court noted the accuracy of the information and its admissible character, a curative instruction, and the trial court's finding of no prejudice.

In Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980), the jury improperly considered a witness list containing references to arson, which had not been charged, and additional indictment numbers. The court affirmed, reasoning that no prejudice occurred because evidence of the arson had been produced at trial and the jury had been instructed that an indictment was not evidence.

In Government of Virgin Islands v. Gereau, 523 F.2d 140 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976), information concerning killings that occurred during the trial and rumors of investigations entered the jury room. Relying on the determination of the trial court and characterizing the incidents as "normal jury pressures and intra-jury influences," 523 F.2d at 151, the court declined to reverse.

In United States v. Klee, 494 F.2d 394 (9th Cir.), cert. denied, 419 U.S. 835 (1974), the jurors had discussed the case during trial, some allegedly forming conclusions. The court affirmed the conviction, noting that the trial judge "was in a better position . . . to determine whether what happened was prejudicial." 494 F.2d at 396.

In a cased cited by defendants, Paz v. United States, 462 F.2d 740 (5th Cir.

1972), the trial court had refused even to remove books about drugs from the jury room during a drug trial. The Fifth Circuit remanded for a hearing, but later upheld the trial court's finding that no prejudice had occurred. Paz v. United States, 473 F.2d 662 (5th Cir.), cert. denied, 414 U.S. 820 (1973).

Finding overwhelming evidence against the defendant, the court in United States v. McKinney, 429 F.2d 1019 (5th Cir.), modified & rev'd on rehearing, 434 F.2d 831 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971), affirmed the conviction. Moreover, the extrinsic evidence was not relevant to any material issue in the case.

These cases illustrate that portion of the continuum in which jury misconduct fails to affect the jury's verdict. We note the similarities. The conclusion of the trial judge, while not determinative,

is entitled to considerable deference. Reviewing courts will not disturb jury verdicts on appeal when extraneous information relates only to issues not material to the guilt or innocence of the defendant. And intrinsic jury processes will not be examined on appeal and cannot support reversal. See generally United States v. Hockridge, 573 F.2d 752, 758-59 (2d Cir.), cert. denied, 439 U.S. 821 (1978).

From our lengthy review of the cases, we conclude that the juror misconduct alleged here fails to warrant reversal. The trial judge conducted a prompt and thorough evidentiary investigation into juror Cohen's actions and applied the correct legal standard.[6/]

We agree with ample precedent in attributing great weight to the finding that the evidence in no way interfered with or affected any juror's decision.

United States v. Bagley, 641 F.2d 1235, 1241 (9th Cir. 1981); Gibson v. Clanon, 633 F.2d 851, 855 (9th Cir. 1980), cert. denied, 101 S. Ct. 1749 (1981); United States v. Renteria, 625 F.2d 1279, 1284 (5th Cir. 1980); United States v. Bohr, 581 F.2d 1294, 1302 (8th Cir.), cert. denied, 439 U.S. 958 (1978); United States v. Hockridge, 573 F.2d 752, 756 (2d Cir.), cert. denied, 439 U.S. 821 (1978); United States v. Hendrix, 549 F.2d 1225, 1227 (9th Cir.), cert. denied, 434 U.S. 818 (1977); United States v. Klee, 494 F.2d 394, 396 (9th Cir.), cert. denied, 419 U.S. 835 (1974); United States v. McKinney, 429 F.2d 1019 (5th Cir.), modified and rev'd on rehearing, 434 F.2d 831 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971).

The information gathered by juror Cohen was irrelevant to the guilt or innocence of the appellants. By the time

of trial it was undisputed that So-Cal did not exist, but was merely a front for the FBI investigation. Mr. Cohen's discovery that So-Cal was not listed in certain business directories confirmed that fact, but adds little more. The existence of So-Cal was immaterial.

Appellants concede this point, but argue that although the existence of the company was not at issue the reasonableness of the defendants' belief that So-Cal existed was crucial to their defenses. They assert that the investigation revealed to the jury either that the appellants did not care whether So-Cal existed, and consequently did not check, or that appellants checked on So-Cal, found that it did not exist, and continued to deal with the company with the knowledge that it was criminal.

Appellants did not assert as a defense that they believed they were

dealing with a corporation whose name appeared in business publications. Any belief appellants may have had that So-Cal was legitimate would have been equally credible regardless whether the company existed or whether its name appeared in a publication.

Mr. Cohen's independent research made appellants' belief neither more nor less credible. Implicit in the knowledge that So-Cal did not exist is that it would not be listed as a corporation in periodicals. The research merely confirmed what any reasonable juror already knew. United States v. Armstrong, 654 F.2d 1328, 1333 (9th Cir. 1981); United States v. Johnson, 647 F.2d 815, 817 (8th Cir. 1981); see Farese v. United States, 428 F.2d 178, 181 (5th Cir. 1970) (material information); Osborne v. United States, 351 F.2d 111, 118 (8th Cir. 1965) (highly damaging and prejudicial infor-

mation); cf. United States v. Vasquez, 597 F.2d 192, 194 (9th Cir. 1979) (highly prejudicial information).

The extraneous information made available by Cohen's independent research was that So-Cal did not appear in two or three business publications and that the absence of a listing could be discovered in a short time. We fail to see any logical connection between the appearance of a So-Cal listing and the company's criminal nature.

A listed company just as easily could be a front for criminal activity as one not listed. Similarly, a corporation without a listing is no more criminal, by that fact alone, than any other company. The connection between the existence of So-Cal, which was not disputed, and the legitimacy of the corporation is too attenuated.

To find a material connection

between the absence of a So-Cal listing and the appellants' belief in the legitimacy of So-Cal would require an assumption that the jury members reached an irrational conclusion lacking in common-sense logic. But we must accept the jury as a rational body, fully capable of making the fine distinctions necessary to the fact finding process. We are not called upon to isolate, examine, and negative each of the possible and irrational constructions on which a jury conceivably could rely.[7/]

Moreover, we discern very little difference in statements that juror Cohen could have offered had he not checked the library and those he actually made after his visit. He said that he went to the library and found in 15 minutes that So-Cal did not exist. We do not view that to be materially different from an assertion that he <u>could</u> go to the library

and find out in 15 minutes that So-Cal did not exist.

We also note the vast body of evidence presented by the government, which tended to show the falsity of the appellants' claims to a reasonable belief in So-Cal's legitimate nature. We need not discuss the evidence in detail, but recognize the many tape recordings, testimony regarding conversations, and the circumstances surrounding the appellants' travels, all of which were well developed by the prosecution.

The trial judge found, and we agree, that "[e]vidence presented at trial . . . overwhelmingly substantied the guilt of each defendant." See United States v. Bassler, 651 F.2d 600, 602-03 (8th Cir. 1981); United States v. Bagley, 641 F.2d 1235, 1241 (9th Cir. 1981); Llewellyn v. Stynchcombe, 609 F.2d 194, 196 (5th Cir. 1980); United States v. McKinney,

429 F.2d 1019 (5th Cir.), modified and rev'd on rehearing, 434 F.2d 831 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971).

Moreover, the judge clearly and carefully delivered instructions to the jury to consider only evidence produced at trial in reaching a verdict. These were given daily during the long trial and again upon summation. This fact alone might justify affirmance. United States v. Bagley, 641 F.2d 1235, 1241 (9th Cir. 1981); Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980). It is all the more compelling when in combination with the immaterial nature of the information, its illogical connection to any relevant or prejudicial jury conclusions, and the trial court's thorough investigation of the incident.

Although we do not condone Mr. Cohen's independent research, we

conclude that it did not so affect the appellants' right to a fair trial that it requires reversal.

III. JENCKS ACTS

Agent Heald testified that shortly after each meeting with appellants (usually within a day) he wrote in longhand a complete draft of a report of the meeting. Heald sent the draft report to a stenographic pool for typing, compared the typed version with his handwritten draft and corrected misspelling and typographical errors, but did not make substantive changes. He then discarded the draft.

At trial, each appellant moved to suppress Heald's testimony, asserting the destruction of the longhand drafts of the typewritten reports violated the Jencks Act, 18 U.S.C. § 3500, and United States

v. Harris, 543 F.2d 1247 (9th Cir. 1976). Harris prohibits the destruction of original interview notes taken by government agents that contain statements "potentially producible" under the statute.

Appellants' argument was rejected in United States v. Kaiser, 660 F.2d 724 (9th Cir. 1981), decided after the trial of this case. As we pointed out in Kaiser, the Jencks Act requires production only of statements "signed or otherwise approved" by the witness. The corrected typewritten reports were "signed or otherwise approved" by agent Heald, but the handwritten drafts from which they were typed were not.

Appellant Walgren's reliance on United States v. Walden, 578 F.2d 966, 970 (3d Cir. 1978) is misplaced. In Walden, the Third Circuit suggested that handwritten drafts of a final report

written by a government agent might be deemed "adopted or approved" by the agent because he sent the handwritten drafts directly to his superior for review before having them typed. 578 F.2d at 570. On remand, the district court held that to approve or adopt a statement the witness must in some manner "affirmatively express his assent to the content of the writing," and that the agent had done so there by sending the drafts directly to his supervisor for review. 465 F. Supp. 255, 260-61 (E.D. Pa. 1978), aff'd, 590 F.2d 85 (3d Cir.), cert. denied, 444 U.S. 849 (1979). In contrast, Heald did not send his reports to his superiors until he had reviewed and corrected the typewritten version.

Although Harris requires the preservation of notes that may be only "potentially producible" under the Jencks Act, the rationale of Harris is inapposite to

the draft reports involved here. Harris relied heavily upon United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975), which held disclosure of an agent's final report was not an adequate substitute for disclosure of an agent's rough interview notes, reasoning:

> there is clearly room for misunderstanding or outright error whenever there is a transfer of information in this manner. In the best of good faith, the statement as recorded in the 302 report may, to some degree at least, reflect the input of the agent. In such a situation, the information contained in the rough notes taken from the witness himself might be more credible and more favorable to the defendant's position.

524 F.2d at 428. The court further recognized:

> [a]nd certainly we cannot consider it beyond the bounds of possibility that a report be distorted because of overzealousness on the part of the agent preparing it, since preparation of the report and the decision whether or not to

> preserve the notes are entirely within the discretion of a single agent acting alone.

Id. at 430 (citations omitted).

The typing of a handwritten draft and correction of the typewritten version does not entail the risk of distortion that inheres in the compilation of a report from rough notes. The copying presents no chance for inadvertent input from the agent; the correction of the typed copy offers very little. If Heald were bent on fabricating an account of the events, he had equal opportunity to tailor his observations to fit his conclusion in writing the original drafts.

Thus, there is no basis for any suggestion there may have been substantive differences between the longhand manuscripts sent to the typing pool and the corrected, typewritten reports approved by agent Heald and produced under the Jencks Act for appellants' use. In all

previous cases applying the Harris preservation rule, there has been some basis for believing the destroyed material may have contained a more accurate account or recordation than the material eventually disclosed. See United States v. Parker, 549 F.2d 1217, 1223 (9th Cir.), cert. denied, 430 U.S. 971 (1977); United States v. Robinson, 546 F.2d 309, 312 (9th Cir. 1976), cert. denied, 430 U.S. 918 (1977); United States v. Well, 572 F.2d 1383, 1384 (9th Cir. 1978); United States v. Finnegan, 568 F.2d 637, 642 (9th Cir. 1977); United States v. Marques, 600 F.2d 742, 748 (9th Cir. 1979), cert. denied, 444 U.S. 1019 (1980). See also United States v. Carrasco, 537 F.2d 372, 377 (9th Cir. 1976).

We conclude the destruction of the drafts violated neither the Jencks Act nor the Harris preservation rule.

IV. THE ENTERPRISE

Appellants Bagnariol and Gallagher argue that the government failed to prove the existence of an enterprise. They correctly assert that the enterprise is a separate and discrete element of a RICO violation. However, the government is not precluded from using the same evidence to establish both the element of an enterprise and the element of a pattern of racketeering. United States v. Turkette, 101 S. Ct. 2524, 2528-29 (1981); see United States v. Diecidue, 603 F.2d 535, 545 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

An enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." United States v. Turkette, 101 S. Ct. at 2528. The government produced sufficient evidence to establish the

existence of such an enterprise. The appellants engaged in many conversations concerning the passing of legislation favorable to gambling in the state of Washington. They discussed forming a separate corporation that would hide their profits. Gallagher stressed that Walgren and Bagnariol held the power to control the expansion of gambling in Washington and to control its operation once made legal. Each appellant, either separately or with another appellant, met with agent Heald in furtherance of the scheme to liberalize gambling.

We believe these activities sufficiently establish the form of the association of the appellants. The purpose of the association was to make legal in the state of Washington a form of gambling from which appellants could profit. In United States v. Zemek, 634 F.2d 1159, 1167 (9th Cir. 1980),

cert. denied, 450 U.S. 916 (1981), we stressed the broad scope of the enterprise definition. See also United States v. Turkette, 101 S. Ct. at 2532; United States v. Elliott, 571 F.2d 880, 897-900 (5th Cir.) (jury entitled to infer existence of an enterprise from largely or wholly circumstantial evidence), cert. denied, 439 U.S. 953 (1978).

In light of our view of the evidence, we reject the contention that proof of the existence of the enterprise was deficient because none of the defendants did anything in furtherance of liberalizing Washington gambling laws. The argument rests on an interpretation of the indictment that is too narrow. The indictment reads:

> The enterprise, as defined in Title 18, United States Code, Section 1961(4), was a group of individuals, to wit: JOHN BAGNARIOL, GORDON W. WALGREN, and PATRICK GALLAGHER, associated in fact for the pur-

> poses of: (a) legalizing and controlling certain unlawful gambling within the State of Washington, including, but not limited to, expanded cardroom gambling, casino gambling, and slot machines; (b) controlling the distribution and servicing of slot machines within the State of Washington; and (c) gaining political offices and offical positions within the State of Washington, and using such political offices and official positions for personal financial gain; all through acts involving extortion, bribery, mail fraud, interstate travel in aid of racketeering, and by avoiding the requirements of the Public Disclosure Law of the State of Washington.

Defendants would have us limit the description of the enterprise to the portion ending with the words "personal financial gain," and ignore the rest as surplusage. We read the indictment to include the allegations "all through acts involving extortion, bribery, mail fraud, interstate travel in aid of racketeering and by avoiding the requirements of the Public Disclosure Law of the State of

Washington" as part of its definition of the enterprise. The government adequately proved these activities. If the contention is that proof of the success of the enterprise was necessary, we reject that as contrary to all generally recognized law of joint criminal activity.

Gallagher suggests that the government relied solely on proof of the pattern of racketeering to establish the existence of the enterprise. Even if that were the case, the Supreme Court in Turkette recognized that "the proof used to establish these separate elements may in particular cases coalesce." 101 S. Ct. at 2528.

In any event, as we note above, the government presented ample evidence to show the existence of an ongoing organization functioning as a continuing unit. See id. That the evidence sometimes consisted of conduct constituting the

pattern of racketeering activity is irrelevant.[8/]

V. INTERSTATE COMMERCE

A. RICO

Counts I and II of the indictment charged appellants with conspiracy to violate the RICO statute and with violation of that statute. Both offenses are defined in 18 U.S.C. § 1962(c),[9/] which applies only to persons associated with an enterprise "engaged in, or the activities of which affect, interstate or foreign commerce."

Appellants argue that the government failed to establish the required nexus with interstate commerce. They point out correctly that the statute requires the activities of the enterprise, not each predicate act, to affect interstate com-

merce. United State v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); accord, United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981).

The effect on commerce is an essential element of a RICO violation, but the required nexus need not be great. A minimal effect on interstate commerce satisfies this jurisdictional element. United States v. Barton, 647 F.2d 224, 233 (2d Cir. 1981); United States v. Rone, 598 F.2d at 573.

Appellants rely on United States v. Rone, 598 F.2d 564 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980) and United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978) to argue that the interstate activities charged as predicate offenses cannot also be used to support the interstate connection of the enterprise.

In Nerone, the court reversed a RICO conviction in which the government had defined the enterprise as a local gambling casino. Under that definition, the government was required to show a connection between the activities of the casino and interstate commerce, but failed to do so.

The court explained:

> The Government might have successfully prosecuted the twelve defendants if it had attempted to introduce evidence showing that the "casino operation" affected commerce. Under the approach which has been taken in many reported decisions, only slight evidence would have been required. Here, because of apparent prosecutorial uncertainty about the theory of its case, . . . the Government made no effort at all to connect the dice and card games to interstate commerce.

563 F.2d at 854-55.

The appellants cite this portion of the Rone opinion that seems to support their argument.

> The statute requires that the activity of the enterprise, not each predicate act of racketeering, have an effect on interstate commerce. The statute refers to "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." The government must show a nexus of the enterprise to interstate or foreign commerce, albeit minimal, to satisfy the requirement.

598 F.2d at 573 (original emphasis) (citations omitted).

When read in context, the Rone language fails to offer appellants the foundation they need. The enterprise alleged was an association of the defendants for the purpose of committing acts of extortion. The court upheld the trial court's jury instruction that defendants could be found guilty if the jury found any one of the three acts, two of which also served as predicate offenses, to have affected interstate commerce. The portion of the opinion quoted by appel-

lants was offered in answer to the Rone defendants' contention that at least two predicate acts must have been found to affect commerce.

In many cases, the government charges an enterprise consisting of a legitimate organization, the activities of which are conducted through a pattern of racketeering. For example, in United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981), the enterprise was defined as Florida's Third Judicial Circuit. The RICO convictions were affirmed because of ample evidence on the record of the circuit's connection with interstate commerce. Id. at 1075 n. 12.

Similarly, in United States v. Altomare, 625 F.2d 5 (4th Cir. 1980), the enterprise was alleged to be the county prosecutor's office. The interstate nexus was found in the "very nature of the powers and duties conferred" upon the

office, as well as in interstate telephone calls from the office, the purchase of supplies and materials originating from without the state, and litigation involving residents of other states. Id. at 7-8. See generally United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981) (enterprise defined as office of state senator); United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980).

In both Stratton and Altomare, the predicate acts were not considered for jurisdictional purposes because they were unrelated to the activities of the enterprise. But when the government defines the enterprise as an association of persons formed for the purpose of conducting illegal acts, the same acts that constitute the activities of the enterprise are the subject of charges for predicate crimes. The government need not choose

between charging these activities as predicate acts or proving the conduct as a basis for jurisdiction.

The interstate commerce nexus must result from the enterprise. It is permissible to find that nexus from acts also charged as predicate acts when those constitute the activities of the enterprise. In Rone, since the enterprise was formed for the purpose of engaging in the extortionate collection of debts, the court held that an interstate commerce connection could be found either from the enterprise itself or from the activities of the enterprise, which were separately charged as predicate acts. 598 F.2d at 573.

Similarly, in United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980), the enerprise was an association formed for the purpose of committing various crimi-

nal acts. The government alleged as predicate acts some of the same activities cited as bases for the interstate connection, which included the use of long distance telephone calls, the purchase of dynamite originating in interstate commerce, and the destruction of automobiles used in activities affecting commerce.

In United States v. Barton, 647 F.2d 224 (2d Cir. 1981), the court found a sufficient interstate nexus on the basis of the defendant's bombing of buildings used in interstate commerce. Id. at 234. These bombings also had been charged separately as predicate acts for the RICO charge. Id. at 227 n. 1. See generally United States v. Malatesta, 583 F.2d 748, 756 (5th Cir. 1978), aff'd on rehearing en banc, 590 F.2d 1379 (5th Cir.) (limited to reevaluation of unre-

lated issue), cert. denied, 440 U.S. 962 (1979).

These cases demonstrate that the same acts that satisfy the interstate commerce nexus to the enterprise also may be alleged as predicate acts. Merely including specific conduct in an indictment as a separate predicate count for RICO purposes does not foreclose its use for jurisdictional purposes.

B. Hobbs Act

Gallagher argues that the government failed to offer evidence sufficient to satisfy the interstate commerce element of his Hobbs Act conviction. We affirm.[10/]

The statutory language of the Hobbs Act,[11/] displays a purpose "to use all the constitutional power Congress has to punish interference with interstate com-

merce by extortion, robbery or physical violence." Stirone v. United States, 361 U.S. 212, 215 (1960). An effect on interstate commerce is established by proof of an actual impact, however small, or in the absence of actual impact, by proof of a probable or potential impact. United States v. Zemek, 634 F.2d 1159, 1173 n. 20 (9th Cir. 1980) cert. denied, 450 U.S. 916 (1981); United States v. Glynn, 627 F.2d 39, 41 (7th Cir. 1980); United States v. Phillips, 577 F.2d 495, 501 (9th Cir.), cert. denied, 439 U.S. 831 (1978).

Gallagher concedes the expansive nature of the interstate commerce requirement, but argues that because So-Cal was a fictitious organization, no potential future impact could be established. He cites United States v. Merolla, 523 F.2d 51 (2d Cir. 1975), and United States v. Jannotti, 501 F. Supp.

1182 (E.D. Pa. 1980) (appeal pending), to argue that although a potential interstate commerce connection is enough the impact must be in fact potential.

Gallagher was convicted of an attempt to extort from So-Cal in return for his help in enacting legislation favorable to gambling in the state of Washington. The prosecution introduced expert testimony tending to show the effects on interstate commerce of expanded gambling activity, including the movement of tourists and workers from other states.

Because of the extensive effects on interstate commerce that would have developed from the anticipated legislation, we need not find the interstate nexus solely in the effects of the extortion on the fictitious corporation So-Cal. It is enough that the scheme, if successful, would have affected commerce.

For example, in United States v. Staszcuk, 517 F.2d 53 (7th Cir.) (en banc), cert. denied, 423 U.S. 837 (1975), defendant had extorted payment in exchange for withholding opposition to a zoning change that would permit construction of an animal hospital. The Hobbs Act conviction was affirmed, even though the structure never was built. The court found a sufficient interstate commerce connection in evidence that the proposed construction would have affected commerce, but for the fortuitous circumstance of the change in plans. Id. at 60. Moreover, the court reasoned that jurisdiction would not have been defeated even if the zoning change had not passed. Id. at 60 n. 19. The potential effects on interstate commerce contemplated in the plan itself were sufficient.

Similarly, in United States v. Gambino, 566 F.2d 414 (2d. Cir. 1977),

cert. denied, 435 U.S. 952 (1978), defendants were convicted under the Hobbs Act based on the extortion of FBI agents who operated a fictitious garbage collection company. The Second Circuit rejected the argument that the effect on interstate commerce was insufficient, holding that the garbage collection business was so wedded to interstate commerce that an actual effect was unnecessary. Id. at 419. Although the FBI-created company actually had purchased equipment from another state and had arranged to dump garbage in other states, the court found such an interstate connection unnecessary. Id.

In United States v. Rindone, 631 F.2d 491 (7th Cir. 1980), the FBI had supplied the money used in the extortionate transaction, and the defendants argued that no interstate nexus was possible. The court affirmed the convic-

tions, noting that jurisdiction had been established:

> in a number of cases where it was factually impossible that the extortion money could ever affect interstate commerce because the payment was intended to be immediately recovered, United States v. Phillips, 577 F.2d 495 (9th Cir.), cert. denied, 439 U.S. 831 (1978), where the victim corporation was an FBI-created shell that in fact had no interstate dealings, United States v. Brooklier, 495 F. Supp. 476 (C.D. Cal. 1978), and where the entity extorted was only a speculative venture that never became established or purchased goods interstate, United States v. Bellomini, 454 F. Supp. 44, 47 (W.D. Pa. 1978).

631 F.2d at 493.[12/]

Gallagher's citation to United States v. Merolla, 523 F.2d 51 (2d Cir. 1975), fails to require a different conclusion. In Merolla, the court reversed a Hobbs Act conviction for lack of interstate commerce impact. It held that because the victim of the extortion only

occasionally engaged in interstate commerce the connection was merely incidental. The court stated:

> The victim's purchase of interstate goods, however, must be of a continuing nature or the relationship between the extortion and any interstate commerce becomes merely conjectural.

Id. at 54.

Sufficient evidence was presented to enable the jury to conclude that the effects on interstate commerce from the anticipated gambling legislation would be continuing. Since the movement of persons and material into the state would be far from conjectural and incidental, Merolla fails to support Gallagher's position.

With his discussion of United States v. Jannotti, 501 F. Supp. 1182 (E.D. Pa. 1980) (appeal pending), Gallagher attempts to assert the defense of legal impossibility. It fails.

In United States v. Brooklier, 459 F. Supp. 476 (C.D. Cal. 1978), then-district Judge Pregerson carefully analyzed the issue of impossibility as a defense to a charge of attempt. The defendants had been convicted under count IV of the indictment of an attempt to violate the Hobbs Act, but argued that because the victim company was an FBI-created front, not involved in interstate commerce, no interstate effect was possible.

After carefully examining the available precedent, including United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976), United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), and United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y.), aff'd, 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978 (1974), Judge Pregerson stated:

> In summary, there appear to be three different views among the circuits on impossibility as a defense to an attempt charge. Under the Third Circuit's Berrigan approach, impossibility, regardless of criminal intent, is a defense. Under this analysis Count IV should be dismissed because defendants' alleged plan to extort money . . . could not possibly have affected interstate commerce . . . . Under the Second Circuit's Roman approach, Count IV should not be dismissed because the indictment amply alleges that the defendants had the criminal intent to violate § 1951, and would have done so but for circumstances unknown to them that prevented an actual violation. Finally, under the Fifth Circuit's Oviedo approach, Count IV should not be dismissed, as the acts of the defendants . . . strongly and unequivocally corroborate an intent to violate the Hobbs Act.

459 F. Supp. at 481.

Judge Pregerson considered the merits of each approach and concluded that Fifth Circuit law should be followed:

> The Fifth Circuit's standard, which requires objective acts to unequivocally corroborate the necessary criminal

> intent, properly accommodates the concerns underlying the conflicting views on the impossibility defense. Such an accommodation safeguards both the government's interest in deterring criminal conduct and the citizen's right not to be injured by "possible erroneous official conclusions about his guilty mind."

Id. at 482 (citing Enker, Impossibility in Criminal Attempts -- Legality and the Legal Process, 53 Minn. L. Rev. 665, 668 (1969)).

The analysis in Brooklier disposes of Gallagher's impossibility defense.[13/] His argument relies on Jannotti, which arose in the Third Circuit. We reject that circuit's approach to legal impossibility as a defense in favor of the law of the Fifth Circuit.

The government's expert witness offered detailed testimony about the potential impact of liberalized gambling laws in Washington. The evidence was sufficient for the jury to find the

requisite effect on interstate commerce to satisfy the jurisdictional requirement.

C. Travel Act

Walgren was convicted of violating the Travel Act, 18 U.S.C. § 1952(a)(3)[14/] by causing the use of an interstate facility, the telephone, with the intent to further the unlawful gambling legislation scheme. He argues that the government failed to prove that the telephone call upon which the Travel Act count was based was interstate. The call was made by Heald to Walgren in Olympia, Washington. Proof of the call's origin in Oregon is necessary to satisfy the interstate element.

On January 30, 1980, Walgren called agent Heald's residence in Portland, Oregon and recorded a message on Heald's telephone answering device. Heald

returned the call to Walgren in Washington that day.

When Walgren's counsel asked Heald if he remembered the location of his call, Heald testified:

> I don't. Probably it was my residence. I'm not sure.

We address Walgren's sufficiency of the evidence argument by asking whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (original emphasis). Evidence that makes the existence of the element only slightly more probable, by itself, is not enough. Id. at 320; see United States v. Marolda, 648 F.2d 623 (9th Cir. 1981).

Our review of the evidence presented by the government leads us to the con-

clusion that the jury reasonably could have found beyond a reasonable doubt that the telephone call crossed state lines. First, the content of the conversation, which was recorded, clearly implies that the call originated at a distant location south of Olympia, Washington. Relevant portions of the transcript read:

> **WALGREN:** Is it warmer down there yet?
>
> . . . .
>
> **HEALD:** I've gotta go down to Eugene [Oregon] tomorrow. Why don't I try to finagle my schedule around and, you know, maybe I can get up there in . . . the next couple of days or whatever.
>
> **WALGREN:** Now, we could, you know, we could vary that, but it might be wise to come up here and look around and see what's happening.
>
> **HEALD:** Oh, sure. Yeah. Okay, why don't I . . . why don't I do that, and, oh, you'll mail that other stuff down to me, huh?

Second, the government presented evidence of a series of telephone conversations between December 14, 1979 and January 31, 1980, from Heald in Portland to the defendants in Washington. The evidence suggests that Heald was in Portland on January 29 and establishes that he was in Portland on January 31. That Heald was there on January 30 as well is not an irrational conclusion.

Considering Heald's testimony, evidence of the series of telephone calls originating from Portland, and the content of the conversation, the jury had before it sufficient direct and circumstantial evidence from which it could conclude beyond a reasonable doubt that the telephone call on January 30 crossed state lines.

Walgren's second challenge to the interstate commerce element of his Travel Act conviction rests on Rewis v. United

States, 401 U.S. 808 (1971), and United States v. Archer, 486 F.2d 670 (2d Cir. 1973). He argues that the government failed to prove that the interstate nature of the telephone call was a necessary and integral part of the Travel Act violation.

In Rewis, the court of appeals had affirmed the convictions of the operators of a gambling business based on the interstate travel of their customers. The Supreme Court reversed. It declined to extend the Travel Act to "criminal activity solely because that activity is at times patronized by persons from another State." 401 U.S. at 812.

The Court rejected the government's theory that the Travel Act is violated when operators of an illegal gambling operation reasonably could foresee the travel of customers from across state lines. Id. at 812. But it did endorse

earlier "cases in which federal courts have correctly applied § 1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity." Id. Because no evidence was produced at trial that the defendants actively had encouraged out-of-state patronage, the Court refused to apply the latter theory to them.

In one of the cases favorably cited by the Court, United States v. Zizzo, 338 F.2d 577 (7th Cir. 1974), cert. denied, 381 U.S. 915 (1965), the operator of a gambling business argued that he did not travel interstate and was indifferent to the interstate travel of his employees. Affirming, the court found it "clear that the gambling business . . . caused the interstate travel by the three employees," and that the jury properly could have found that the defendant knew some of the employees lived outside the

state. Id. at 580; see United States v. Baker, 611 F.2d 961, 963 n. 3 (4th Cir. 1979).

Walgren was convicted of causing Heald to make an interstate telephone call. We find unpersuasive Walgren's argument that Heald was a customer of the illegal enterprise.

Heald was not a mere patron of the bribery scheme. The government produced evidence that Walgren and Heald were actively involved in the scheme itself, and that Walgren's telephone call on January 30 in fact caused the use of interstate facilities. See United States v. Clark, 646 F.2d 1259, 1267-68 (8th Cir. 1981); United States v. Baker, 611 F.2d 961, 963 (4th Cir. 1979); United States v. Ryan, 548 F.2d 782, 787 (9th Cir. 1976), cert. denied, 430 U.S. 965 (1977); United States v. Mazzio, 501 F. Supp. 340, 343-44 (E.D. Pa. 1980).

We find United States v. Archer, 486 F.2d 670 (2d Cir. 1973), inapposite. In Archer, federal agents created a scheme designed to elicit criminal activity from within the New York criminal justice system. The agents staged a fictitious arrest, falsified arrest records, and crossed state lines expressly for the purpose of causing defendants to use interstate facilities.15/

The court found three interstate or foreign telephone calls made by defendant insufficient to satisfy the interstate requirements of the Act. It rejected two of the calls because they resulted from the government's plan of misinformation, which caused the defendant to make interstate telephone calls he otherwise would not have made. Id. at 682. The remaining call was rejected as "'casual and incidental.'" Id. at 685.

In United States v. O'Connor, 635 F.2d 814 (10th Cir. 1980), the Tenth Circuit identified the two significant factors in Archer. The court noted that whether the defendant or government takes the initiative is a substantial difference. 635 F.2d at 817. Here, Walgren initiated the interstate telephone call by leaving a message on Heald's answering device.

Heald's residence was not established in Oregon solely to manufacture federal jurisdiction. His undercover operation had existed for nearly a year in Portland, in which he worked on another case before the Washington gambling scheme commenced. This is not a case, such as that in Archer, in which government agents manufactured federal jurisdiction. See United States v. O'Connor, 635 F.2d 814, 817 (10th Cir. 1980); United States v. Perrin, 580 F.2d

730, 736 (5th Cir. 1978), aff'd 444 U.S. 37 (1979); United States v. Hall, 536 F.2d 313, 327 (10th Cir.), cert. denied, 429 U.S. 919 (1976).

The O'Connor court identified the second factor to be the "casual and incidental" nature of the interstate telephone calls in Archer. 635 F.2d at 818. The transcript of the recorded telephone call on January 30 reveals the integral connection of the conversation to the illegal enterprise. Walgren referred to the Chairman of the Gambling Commission and to copies of legislative bills he intended to forward to Heald. He also mentioned talking to his partner about the sale of his trucking company, which he anticipated as a means of concealing his receipt of the bribe.[16/]

In any event, the telephone call need not comprise the essence of the illegal activity. A Travel Act con-

viction needs "evidence of a continuous enterprise and one act in interstate commerce in furtherance of that enterprise." United States v. Tavelman, 650 F.2d 1133, 1140 (9th Cir. 1981); accord, United States v. Kaiser, 660 F.2d 724 (9th Cir 1981). The evidence was sufficient to enable the jury to find that the telephone call was in furtherance of the enterprise. See United States v. O'Connor, 635 F.2d 814, 817-18 (10th Cir. 1980); United States v. Herrera, 584 F.2d 1137, 1145-47 (2d Cir. 1978). See generally United States v. Colacurcio, 499 F.2d 1401, 1406 (9th Cir. 1974).

D. MAIL FRAUD

Walgren also attacks his conviction under Count XXVII for mail fraud, 18 U.S.C. § 1341.[17/] Walgren received

indirectly from Heald a contribution to his campaign for state Attorney General. Walgren was required by state law to report the contribution to the Public Disclosure Commission either himself or through his political committee. His committee's March 10, 1980 public disclosure report did not include this contribution and Walgren did not report it personally. The indictment charged Walgren "knowingly caused to be delivered by mail" the committee's March report for the purpose of executing the gambling scheme.

Walgren argues his conviction under this count was invalid because the political committee's report included all contributions of which the committee was aware and because filing the report was compelled by state law. He cites Parr v. United States, 363 U.S. 370 (1960). In Parr, the defendants schemed to embezzle

school district funds and mailed tax assessments to raise the funds to be embezzled. The Supreme Court reversed on the ground that government failed to prove defendants used the mails for the purpose of executing their embezzlement scheme. 363 U.S. at 391. The Court held that the mailing of the tax assessments was not an unlawful step in the execution of the fraudulent scheme because the defendants were required by law to assess and collect the taxes and because the tax assessments were neither alleged nor proved to be excessive, padded or in any way illegal. Id. at 387, 391.

Walgren's reliance on Parr assumes the legality of the March financial disclosure report mailed by his political committee. Walgren contends on appeal that the report was accurate because it disclosed all contributions known to the committee and that he could have complied

with the disclosure law by reporting the contribution personally.

Heald's contribution to Walgren's campaign was a camouflaged portion of the payoff for Walgren's political influence. Walgren expressed his intention to withhold disclosure of the payment to maintain its secrecy. He was responsible for reporting Heald's contribution either personally or through his committee. By doing neither, Walgren caused the committee to mail a disclosure report that was inaccurate because it did not include Heald's contribution. Walgren cannot cure the inaccuracy now by arguing he could have reported the contribution personally. He did not in fact do so.

Walgren's scheme to enrich himself by his use of his legislative position required profits to be hidden. By causing the committee to submit an inaccurate disclosure report, he hoped to conceal

the receipt of a service of value. With such a design in mind, he cannot now argue that the mailing was not in furtherance of his illegal scheme.

VI. CONCLUSION

The appellants' arguments do not justify reversal. The convictions are affirmed.

FOOTNOTES

1/In contrast to Jannotti, the Eastern District of New York, in United States v. Myers, No. CR 80-00249 (E.D.N.Y. July 24, 1981) (appeal pending), found no due process violation in the Abscam investigation. The court found no impropriety in the government's setting up a business entity as an attractive target for corrupt overtures from congressmen generally. The court distinguished the tactics used in Jannotti by noting the government did not offer the Myers defendants the alternative of either accepting payment or losing a substantial benefit for their constituency.

2/Appellants also rely on United States v. Archer, 486 F.2d 670 (2d Cir. 1973), in which the Second Circuit reversed Travel Act and conspiracy convictions on narrow federal jurisdiction grounds. The court severely criticized the federal government's investigatory techniques, but expressly declined to decide whether the government's involvement required reversal. 486 F.2d at 676.

Unlike the government activity in Archer, which we discuss later in this opinion, the conduct in this case violated no laws other than those under which appellants were prosecuted.

3/Extraneous information tending to show guilt or otherwise improperly to influence the jury must be carefully scrutinized. The jury's consideration of extraneous information deprives defen-

dants of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction. See Gibson v. Clannon, 633 F.2d 851, 854 (9th Cir. 1980), cert. denied, 101 S. Ct. 1749 (1981).

4/Fed. R. Evid. 606(b) reads:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

The policy embraced by Fed. R. Evid. 606(b) serves several public interests. The rule discourages harassment of jurors by defendants after a guilty verdict, encourages free and open discussion in the jury room, reduces incentives for jury tampering, promotes finality, and respects the institution of the jury as a fact-finding body. See McDonald v. Pless, 238 U.S. 264, 267 (1915); Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

5/Compare United States v. Renteria, 625 F.2d 1279 (5th Cir. 1980) ("If the trial judge finds that the jury had before it prejudicial material, the inquiry is complete and the conviction must be reversed."), and Farese v. United States, 428 F.2d 178 (5th Cir. 1970), with Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980), and United States v. McKinney, 429 F.2d 1019 (5th Cir.), modified & rev'd on rehearing, 434 F.2d 831 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971). To the extent Farese and Renteria may be read to state a per se test in the Fifth Circuit, a reading with which we disagree, we decline to acknowledge such a test in this circuit.

6/The trial judge cited United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979), and applied the standard of review articulated there:

> [T]he appellant is entitled to a new trial if there existed a reasonable possibility that the extrinsic material could have affected the verdict.

Id. at 193.

Constitutional errors demand a strict standard of review. Chapman v. California, 386 U.S. 18 (1967). The Vasquez standard has been held equivalent to the standard announced in Chapman. Gibson v. Clannon, 633 F.2d 851, 853 (9th Cir. 1980), cert. denied, 101 S. Ct. 1749 (1981). The trial court applied the correct standard when it found that the extrinsic evidence "could not have possibly tainted the verdict."

7/As we stated in United States v. Nelson, 419 F.2d 1237, 1245 (9th Cir. 1969):

> Juries constantly convict, and the convictions are duly affirmed, on evidence upon which none would hesitate to act but which cannot be said to exclude as a matter of inexorable logic, every reasonable hypothetical consistent with innocence.

8/All three appellants argued that a wholly illegal enterprise cannot support a RICO conviction. Although recognizing that United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980) rejects such a position in this circuit, they presented the argument in the hope that the Supreme Court would adopt the contrary position of the First Circuit. United States v. Turkette, 632 F.2d 896 (1st Cir. 1980).

The Supreme Court rejected the First Circuit's interpretation before oral argument. United States v. Turkette, 101 S. Ct. 2524 (1981).

9/18 U.S.C. § 1962 (c) reads:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

10/Defendant Bagnariol also was convicted of a Hobbs Act violation, but he does not argue for reversal. Had he urged reversal on a similar ground, our discussion here would apply equally to him.

11/18 U.S.C. § 1951. The relevant portions of the Hobbs Act read:

> (a) Whoever in any way or degree obstructs, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section . . . (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

12/Notwithstanding its favorable citation to United States v. Brooklier, 459 F. Supp. 476 (C.D. Cal. 1978), the Rindone court in dictum distinguished the case in which it is legally impossible that the extortion would affect commerce. 631 F.2d at 493.

Considering the favorable citation to and quotation of language from Brooklier that is found in Rindone, we are not convinced that the court would reach a different result were it to confront a defense of legal impossibility.

Although we believe Gallagher's argument could be answered adequately by Rindone, we need not rely on it. The nexus to interstate commerce was established sufficiently by evidence showing the effects of liberalized gambling laws.

13/The validity of the defense in this case, in any event is questionable. The government did not rely on the interstate commerce effects of the extortion payment, but on the potential effects of the gambling legislation for which defendant agreed to work. The potential interstate commerce effects need not derive solely from the transaction involved in the extortion, but may arise from the natural consequences of the extortion. In this case, the natural consequences were increased gambling and its concomitant effect on interstate commerce.

14/18 U.S.C. § 1952(a)(3) reads:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --
> . . .

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specific in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

15/Archer has been characterized as a case involving "virtual entrapment," United States v. Hall, 536 F.2d 313, 327 (10th Cir.), cert. denied 429 U.S. 919 (1976), and has been severely restricted. The Second Circuit itself referred to Archer as addressing a "federally provoked incident of local corruption." United States v. Gambino, 566 F.2d 414, 419 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978).

Because of the Archer court's nearly overriding concern with the extreme nature of the government's tactics, the case cannot offer the generally applicable principles sought by Walgren.

16The view that the Travel Act does not encompass minimal or incidental use of interstate facilities is not held uniformly by the circuits. Although the Second and Seventh Circuits appear to have adopted such an interpretation, see United States v. Herrera, 584 F.2d 1137 (2d Cir. 1978); United States v. Altobella, 442 F.2d 310 (7th Cir. 1971), the Fourth and Sixth Circuits have

rejected it. United States v. Alsobrook, 620 F.2d 139, 143-44 n. 5 (6th Cir.) cert. denied, 449 U.S. 843 (1980); United States v. Eisner, 533 F.2d 987 (6th Cir.), cert. denied, 429 U.S. 919 (1976).

Because we find more than an incidental use of interstate facilities in this case, we need not decide whether casual and incidental use fails to satisfy the Travel Act in this circuit.

17/18 U.S.C. § 1341 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX B

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

AUG 20 1980

JOE R. ROMANE, Clerk
By ET, Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. JOHN BAGNARIOL, GORDON L. WALGREN and PATRICK GALLAGHER, Defendants.	)	NO. CR80-126M O R D E R

THIS MATTER came on to be heard before the undersigned Judge of the above-entitled Court upon the motion of defendants to suppress certain testimony.

Because the Government failed to preserve the original notes prepared by

Agent Heald after certain conversations with one or more of the defendants, the motion before the Court is to suppress the testimony of Agent Heald as it would relate those conversations. The requested sanction is claimed under 18 U.S.C. § 3500(d), the Jencks Act. Defendants claim that such writings constitute "a written statement made by said witness and . . . adopted . . . by him;" 18 U.S.C. § 3500(e)(1).

The Act requires that the Government preserve all original notes taken by its agent during interviews with prospective government witnesses or with an accused. United States v. Harris, 543 F.2d 1247 (9 Cir. 1976). Also see United States v. Robinson, 546 F.2d 309 (9 Cir. 1976) and United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975).

The rough interview notes which were the subject matter of Harris must be

distinguished from the rough undercover or surveillance notes presented in the instant case. Unlike the strict interview circumstances presented in Harris, Agent Heald was at all relevant times here engaged in undercover activities. As such, his notes were not written contemporaneously with his contacts with the defendants, but hours and even days later.

The rationale of the Court in United States v. Spencer, No. 70-1085 at 3166 (9 Cir. May 12, 1980) and United States v. Bernard, No. 78-3033 (9 Cir. April 28, 1980) is more appropriately applied to the facts at hand than is the rationale of Harris. In both Spencer and Bernard the Court found that rough surveillance notes (as distinguished from interview notes) did not constitute a "statement" within the meaning of the Jencks Act and therefore did not have to be produced

under the terms of that Act.

The very nature of the undercover role produces note-taking results substantially different than those produced from a true interview. As the Court said in Bernard:

> "Interrogation notes are intended to be factual only. Notes of undercover activity might well contain impressionary matter involving diverse persons."

I would also add that the notes of the undercover agent would ordinarily, as here, also contain a combination of the Agent's impressions, conclusions and summarizations, as well as a recitation of other existing factual and physical matters which would be completely extraneous to an interview report. Agent Heald's 302's on file herein clearly shows that they are the off-spring of such a "mixed-bag" of rough notes. As such, those rough notes and 302's are not

"statements" within the meaning of 18 U.S.C. 3500(e). The facts in United States v. Lane, 574 F.2d 1019 (10 Cir. 1978) are basically similar to the facts at hand. The conclusion reached there is the same as the one reached here for like reasons.

NOW, THEREFORE, the motion of defendants to suppress or strike the testimony of Agent Harold W. Heald for failure to retain his rough-draft 302 notes be and the same is hereby DENIED.

DATED this 20th date of August, 1980.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States
District Judge

APPENDIX C

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NOV 21 1980

BRUCE RIFKIN, Clerk
By ET, Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. JOHN BAGNARIOL, GORDON L. WALGREN and PATRICK GALLAGHER, Defendants.	)	NO. CR80-126M O R D E R

THIS MATTER came on to be heard before the undersigned Judge of the above-entitled Court upon the motion by defendants for a mistrial.

Defendants' motion is based on allegations of juror misconduct, that is,

that some matters may have been brought to the attention of the jurors that were not properly in evidence. Two such matters are at issue. The first is an allegation that Juror Paul Cohen had discussed with other jurors that a psychological profile of the defendants could be obtained in order to determine if the defendants were capable of committing the crimes charged in the Indictment. The second allegation is the Juror Cohen went to the Seattle Public Library and reviewed certain business periodicals to determine whether So-Cal, the Federal Bureau of Investigation (FBI) "front" company in this lawsuit, was listed as an existing corporation. Mr. Cohen thereafter allegedly transmitted his findings to various members of the jury.

As the record will show, the Court, upon learning of these allegations, conducted evidentiary hearings of all jurors

so as to determine the precise nature of the claimed jury breach. These hearings were limited to ascertaining the extent, if any, that jurors discussed the extrinsic evidence and the circumstances surrounding the breach. United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979). No examination was conducted into the possible subjective effect of the alleged breach upon any single juror.

As a result of this investigation, it is the opinion of the Court that the allegation of jury misconduct concerning a psychological profile of the defendants is totally without merit. It is beyond any and all doubt that no such profile was carried out, or was ever claimed to have been carried out, and therefore in no way influenced the verdict.

The allegation of jury misconduct in regard to Juror Cohen's research into the existence of So-Cal is more problematic.

Juror Cohen, by his own words, while visiting the Seattle Public Library sometime before or during deliberations, checked Dun and Bradstreet's record of stock transactions and possibly one other business publication to determine whether So-Cal in fact existed.[1/] After some 14 minutes of research, Cohen concluded that So-Cal was not registered within those periodicals which he had examined and that it therefore did not exist. Cohen apparently informed some jury members of his actions and findings. While it is not totally evident from either Mr. Cohen's or other members of the jury testimony, it appears that Cohen may have inferred to various members of the panel that he, as a normal and cautious man,

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1/Transcript of Proceedings in U.S. v. John Bagnariol, et al., CR80-126 -- on November 7, 1980 at 38-47 and 73-78.

would have checked-out any organization which he was intending to do business with and he was surprised and thought it odd that the defendants did not research So-Cal in the manner that he had.[2/]

Whether a new trial should be granted based upon these allegations of jury misconduct is a matter within the discretion of the trial judge. This decision must be based on a case-by-case review of all the facts and circumstances surrounding the case. United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976).

Defendants urge the Court to resolve this matter by employing the legal standard set forth in Remmer v. United States, 347 U.S. 227 (1954).

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before

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2/ Id.

> the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

The Court, in accordance with the law of the Ninth Circuit in those cases of jury misconduct outside the unique circumstances presented in Remmer, declines the defendant's invitation. United States v. Love, 535 F.2d 1152 (9th Cir. 1974); United States v. Vasquez, supra. It has in fact been suggested that in those situations beyond the confines of Remmer, the defendant has the burden of persuasion. United States v. Marques, 600 F.2d 742 (9th Cir. 1979); United States v. Weiner, 578 F.2d 757 (9th Cir. 1978).

Regardless of which party should carry the burden of persuasion, in instances such as this where members of the jury are exposed to information not properly admitted during trial, the test is whether the information or misconduct prejudiced the defendant to the extent that he has not received a fair trial. United States v. Klee, 494 F.2d 394 (9th Cir. 1974); Alessio, supra; Marques, supra: Love, supra; Weiner, supra.

In short, any one of the defendants is entitled to a new trial if there exists a reasonable possibility that the extrinsic evidence produced by Cohen's venture could have affected the verdict. Vasquez, supra, at 193. Only one juror need be so unduly prejudiced or improperly influenced by Cohen's actions to mandate a new trial. United States v. Hendrix, 594 F.2d 1225 (9th Cir. 1977).

Applying these principles of law to the instance of jury misconduct at issue, it is readily apparent that the extrinsic evidence made available to certain members of the jury as a result of Mr. Cohen's private investigation could not have possibly tainted the verdict. Cohen's actions, in light of evidence already produced at trial, was not so prejudicial that it in any way interfered with or affected a juror's decision.

It is beyond question that all of the evidence adduced in open court revealed that So-Cal was nothing more than a non-existent "front," created solely for purposes of the FBI's investigation. The defendants do not dispute this finding. The additional factfinding performed by Cohen was in accordance with, and at most, cumulative to the body of evidence already properly before the jury. The jury misconduct was therefore

neither prejudicial nor could it have affected the verdict.

Morever, as acknowledged by the defendants,[3] the Court, on a daily basis and upon summation,[4] carefully instructed the jurors to consider for verdict purposes only that evidence which had been produced at trial. There is no indication that any one of the jurors failed to heed the Court's admonition throughout their deliberations.

Even if the Court were to assume, which it does not, that Cohen's misconduct in some fashion affected the verdict, it was at the most, harmless error. Evidence presented at trial, particularly the tape conversations and testimony by the Government's witnesses,

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3/U.S. v. Bagnariol, supra, Defendant's Memorandum of Jury Misconduct at 8.

4/Id., Jury Instructions at No. 4.

overwhelmingly substantiated the guilt of each defendant. As such, it is evidence that the jury misconduct alleged herein could not have constituted prejudicial error. See, United States v. Marx, 485 F.2d 1179 (10th Cir. 1973).

While not necessary to the Court's holding on this matter, those primary reasons having been discussed above, it is significant to point out additionally that the issue of So-Cal's existence was immaterial to and could have in no way affected those verdicts reached against defendants Walgren and Gallagher. Defendant Walgren's defense focused on the fact that he had never heard mention of any percentage figure and the only reason he was dealing with So-Cal was in hopes of securing campaign funds. Defendant Gallagher asserted that he never intended to change any laws on behalf of So-Cal but was attempting merely to line his own

pockets in a plot to scam the scammers.

The existence or non-existence of So-Cal is therefore irrelevant and of no consequence to the theories advanced by either of those two defendants.

Based upon the reasoning discussed herein, it is the belief of the Court that the alleged misconduct of Juror Paul Cohen could in no way have affected the verdicts reached in this case.

NOW, THEREFORE, the motions by each defendant for a mistrial in the above-entitled action are DENIED.

DATED this 21st day of November, 1980.

/s/ Walter T. McGovern
WALTER T. McGOVERN
Chief United States
District Judge

APPENDIX D

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NOV 24 1980

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. CR80-126M
	)	Superseding
JOHN BAGNARIOL	)	Indictment
	)	

On this 24th day of November, 1980 came the attorney for the government and the defendant appeared in person and with counsel, Anthony Savage and Deborah Youngblood.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty as to Counts I, II, III, IV, VIII, XI, XII, XIII, and XXII, has been convicted of the offense of viola-

tion of Title 18, United States Code, Section 1962(d) [Count I]; Title 18, United States Code, Section 1962(c) and Title 18, United States Code, Section 2 [Count II]; Title 18, United States Code, Section 1951 and Title 18, United States Code, Section 2 [Count III]; Title 18, United States Code, Section 1952(a)(3) [Counts IV, VII, XI, XII, and XIII]; and Title 18, United States Code, Section 1341 and Title 18, United States Code, Section 2 [Count XXII], as charged in the Superseding Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown on appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YERS as to Count I.

IT IS ADJUDGED that on each of Counts II, III, IV, VIII, XI, XII, XIII, and XXII the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS. Said sentence on Counts II, III, IV, VIII, XI, XII, XIII, and XXII to run concurrently with the sentence imposed on Count I

IT IS ADJUDGED that the original Indictment dated April 17, 1930, is hereby dismissed upon motion of the Government.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified office and that the

copy serve as the commitment of the defendant.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States
District Judge

Presented by:

/s/ John C. Merkel
JOHN C. MERKEL
United States Attorney

APPENDIX E

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NOV 24 1980

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. CR80-126M
	)	Superseding
PATRICK GALLAGHER	)	Indictment
	)	

On this 24th day of November, 1980 came the attorney for the government and the defendant appeared in person and with counsel, Laurence B. Finegold and Thomas W. Hillier.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty as to Cts. I, II, III, IV, VI, VII, VIII, IX, XIV, XV, XVIII, XXII, XXV, and XXVI, has been convicted of the

offense of violation of Title 18, United States Code, Section 1962(d) [Count I]; Title 18, United States Code, Section 1962(c) and Title 18, United States Code, Section 2 [Count II]; Title 18, United States Code Section 1951 and Title 18, United States Code, Section 2 [Count III]; Title 18 United States Code, Section 1952(a)(3) [Counts IV, VI, VII, VIII, IX, XIV, and XV]; and Title 18, United States Code, Section 1341 and Title 18, United States Code, Section 2 [Counts XVIII, XXII, XXV, and XXVI], as charged in the Superseding Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is

hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS as to Count I.

IT IS ADJUDGED that on each of Counts II, III, IV, VI, VII, VIII, IX, XIV, XV, XVIII, XXII, XXV, and XXVI the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS. Said sentence on Counts II, III, IV, VI, VII, VIII, IX, XIV, XV, XVIII, XXV, and XXVI to run concurrently with the sentence imposed on Count I.

IT IS ADJUDGED that the original indictment dated April 17, 1980 is hereby dismisssed upon motion of the Government.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified office and that the

copy serve as the commitment of the defendant.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States
District Judge

Presented by:

/s/ John C. Merkel
JOHN C. MERKEL
United States Attorney

APPENDIX F

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NOV 24 1980

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. CR80-126M
	)	Superseding
GORDON L. WALGREN	)	Indictment
	)	

On this 24th day of November, 1980 came the attorney for the government and the defendant appeared in person and with counsel, Murray B. Guterson.

IT IS ADJUDGED that the defendant upon his plea of not guilty, and a verdict of guilty as to Counts II, XVII, and XXIV, has been convicted of the offense of violation of Title 18, United States Code, Section 1962(c) and Title 18,

United States Code, Section 2 [Count II]; Title 18, United States Code, Section 1952(a)(3) [Count XVII]; and Title 18, United States Code, Section 1341 and Title 18, United States Code, Section 2 [Count XXIV], as charged in the Superseding Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS as to Count II.

IT IS ADJUDGED that on each of Counts XVII and XXIV the defendant is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS. Said sentence on Counts XVII and XXIV to run concurrently with the sentence imposed on Count II.

IT IS ADJUDGED that the original indictment dated April 17, 1980 is hereby dismisssed upon motion of the Government.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States
District Judge

Presented by:

/s/ John C. Merkel
JOHN C. MERKEL
United States Attorney

APPENDIX G

FILED
FEB 2, 1982
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN BAGNARIOL, Defendant-Appellant.	NO. 80-1820 D.C. No. CR 80-126-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GORDON L. WALGREN, Defendant-Appellant.	NO. 80-1821 D.C. No. CR 80-126-2
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PATRICK GALLAGHER, Defendant-Appellant.	NO. 80-1822 D.C. No. CR 80-126-3 ORDER

Before: BROWNING, Chief Judge, WRIGHT, Circuit Judge, and THOMPSON,* District Judge

The panel as constituted in the above cases has voted to deny the petitions for rehearing in all three cases and to reject the suggestions for rehearing en banc in USA v. Walgren and USA v. Gallagher.

The full court has been advised of the suggestions for en banc rehearing. No judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

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*Honorable Bruce R. Thompson, Senior Judge, United States District Court for the District of Nevada, sitting by designation.

APPENDIX H

CONSTITUTIONAL PROVISIONS AND STATUTES PERTINENT TO REVIEW

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment 5
Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 6
Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES STATUTES:

United States Code, Title 18:
§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures

its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

United States Code, Title 18:
Chapter 63 -- Mail Fraud
§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious

article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

United States Code, Title 18:
Chapter 95 -- Racketeering
§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity

in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of offical right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-

115, 151-1666 of Title 29 or sections 151-188 of Title 45.

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be

fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery or arson in violation of the laws of the State in which committed or of the United States.

. . . .

United States Code, Title 18:
Chapter 96 -- Racketeer Influenced and Corrupt Organizations
§ 1961. Definitions

As used in this chapter --

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery,

bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of Title 18, United States Code: . . . Section 1341 (relating to mail fraud) . . . Section 1951 (relating to interference with commerce, robbery, or extortion), Section 1952 (relating to racketeering) . . . .

. . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten

years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

. . . .

§ 1962. Prohibited activities

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), (c) of this section.

United States Code, Title 18:
§ 3500. Demands for production of statements and reports of witnesses

. . . .

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for this examination and use.

. . . .

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such state-

ment, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the make of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATUTES OF THE STATE OF WASHINGTON:

Washington Revised Code § 9A.68.010. Bribery

(1) A person is guilty of bribery if:

(a) With the intent to secure a particular result in a particular matter involving the exercise of the public servant's vote, opinion, judgment, exercise of discretion, or other action in his official capacity, he offers, confers, or agrees to confer any pecuniary benefit upon such public servant; or

(b) Being a public servant, he requests, accepts, or agrees to accept any pecuniary benefit pursuant to an agreement or understanding that his vote,

opinion, judgment, exercise of discretion, or other action as a public servant will be used to secure or attempt to secure a particular result in a particular matter.

. . . .

Washington Revised Code Chapter 42.17 -- Disclosure -- Campaign Finances -- Lobbying -- Records

§ 42.17.020 Definitions

. . . .

(5) "Candidate" means any individual who seeks election to public office. An individual shall be deemed to seek election when he first:

(a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote his candidacy for office; or

(b) Announces publicly or files for office.

. . . .

(24) "Political committee" means any person (except a candidate or an individual dealing with his own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.

. . . .

§ 42.17.080 Candidates' and treasurers' duty to report

. . . .

(2) At the following intervals each campaign treasurer shall file with the commission and the county auditor of the county in which the candidate resides (or in the case of a political committee supporting or opposing a ballot proposition the county in which the campaign treasurer resides) a further report of the contributions received and expenditures made since the date of the last report:

. . . .

(c) On the tenth day of each month preceding the election in which no other reports are required to be filed under this section: Provided, That such report shall only be filed if the committee has received a contribution or made an expenditure in the preceding calendar month. Interest on moneys deposited or service charges shall not be deemed contributions or expenditures.

. . . .

(3) The campaign treasurer shall maintain books of account in accordance with generally accepted accounting principles reflecting all contributions and expenditures on a current basis within three business days of receipt or expenditure. . . .

. . . .

APPENDIX I

FILED
FEB 23 1982

Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN BAGNARIOL, GORDON L. WALGREN, and PATRICK GALLAGHER, Defendants-Appellants	Nos.	80-1820 80-1821 80-1822

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41 (b) Fed.R.App.P.)

Upon due consideration of appellants' motions for stays of the mandates of this Court in the above causes pending the filing, consideration and disposition by the Supreme Court of the United States of petitions for writ of certiorari, such petitions to be filed in the Clerk's

Office of the Supreme Court of the United States on or before March 23, 1982,

IT IS ORDERED that the motions for stays of mandates be, and the same are hereby granted.*

/s/ James Browning
United States Circuit Judge

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.